TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914. 1915

No. 500, 162

CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE OF THE ESTATE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT, APPELLANT,

vs.

CHICAGO AUDITORIUM ASSOCIATION.

FILED MAY 25, 1914.

No. [redacted] 174

CHICAGO AUDITORIUM ASSOCIATION, APPELLANT,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE OF THE ESTATE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT.

FILED JUNE 10, 1914.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

(24,239 & 24,265)

(24,239 & 24,265)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 500.

CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE OF THE ESTATE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT, APPELLANT,

vs.

CHICAGO AUDITORIUM ASSOCIATION.

FILED MAY 25, 1914.

No. 521.

CHICAGO AUDITORIUM ASSOCIATION, APPELLANT,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE OF THE ESTATE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT.

FILED JUNE 10, 1914.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 25, 1914.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1912

No. 2020

IN THE MATTER OF FRANK E. SCOTT TRANSFER CO., BANKRUPT.

CHICAGO AUDITORIUM ASSOCIATION,
Appellant,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE OF THE ESTATE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT,
Appellee.

MR. RUDOLPH MATZ,
MR. WILLIAM D. BANGS,
Counsel for Appellant.

MR. F. D. SILBER,
MR. M. J. ISAACS,
MR. C. J. SILBER,
MR. J. D. MORLEY,
Counsel for Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

INDEX.

1 Pleas had at a regular Term of the District Court of Plac
the United States for the Eastern Division of the Northern District of Illinois, begun and held at the United States Court Rooms in the City of Chicago, in said Division of said District on the first Monday of May, (it being the fifth day thereof) in the year of our Lord One Thousand Nine Hundred and Thirteen and of the Independence of the United States of America the One Hundred and Thirty-seventh year.

Present, the Honorable Kenesaw M. Landis, and the Honorable George A. Carpenter, Judges of said Court presiding, Luman T. Hoy, United States Marshal for this District and T. C. MacMillan, Clerk of said Court.

d Feb. 8, 1912.

2 In the matter of Frank E. Scott Transfer Company, a Corporation, Bankrupt. Claim of Chicago Auditorium Association. } No. 19005.

Be It Remembered that heretofore, to wit, on the 28th day of February, A. D. 1912, there was in the Office of the Clerk of the District Court of the United States for the Northern District of Illinois, a Proof of Debt Due Corporation; in the above entitled cause, same being in the words and figures following, to wit:

3 Form No. 33.

PROOF OF DEBT DUE CORPORATION.

In the District Court of the United States,

For the Northern District of Illinois

In the Matter of Frank E. Scott Transfer Company, Bankrupt. } In Bankruptcy. 19005

At Chicago, in said district of Illinois, on the twenty-seventh day of February, A. D. 1912 came A. W. Sawyer, of Chicago, in the county of Cook, and State of Illinois, and made oath and says that he is Secretary of the Chicago Auditorium Association, a corporation incorporated by and under the laws of the State of Illinois, and carrying on business at Chicago, in the county of Cook and State of Illinois, and that he is duly authorized to make this proof, and says that the said Frank E. Scott Transfer Company, the person (1) against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of Three Hundred and Eleven dollars and twenty cents; that the consideration of said debt is as follows: the Baggage and Car-

riage privilege at the Chicago Auditorium Hotel during the Filed 28, months of May, June and July 1911, under a contract between the said Chicago Auditorium Association and said Frank E. Scott Transfer Company, covering the period from February 1, 1911 to February 1, 1916, a copy whereof is hereto attached marked Exhibit A; affiant further says that by reason of the bankruptcy of said Frank E. Scott Transfer Company, said bankrupt has been unable and has failed to perform said contract; that by reason thereof said Chicago Auditorium Association has been compelled to make new Baggage and Livery arrangements to its loss and damage as affiant verily believes, in the sum of Six Thousand Two Hundred Twenty-six Dollars and seventy-four cents ($6,226.74), as set forth in the account attached hereto marked Exhibit B; wherefore said Chicago Auditorium Association makes further claim against the estate of said bankrupt in said sum of Six Thousand Two Hundred Twenty-six Dollars and seventy-four cents ($6,226.74), making a total claim of Six Thousand Five Hundred Thirty-seven Dollars and ninety-four cents ($6,537.-94); that no part of said claim has been paid, that there are no set-offs nor counterclaims thereto, that no note has been received therefor or judgment rendered thereon, or for or on any part thereof. The secretary of said Chicago Auditorium Association makes this proof of claim because the treasurer of said corporation has no independent knowledge of the transactions involved therein, and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security whatever for said claim or any part thereof.

A. W. Sawyer
(Seal) *Secretary of said Corporation.*

Subscribed and Sworn to before me, this 27th day of February A. D. 1912.

Carl Zeiss
Notary Public
[Official Character]

(1.) If a Voluntary Bankrupt, insert the word "by." If Involuntary, the word "against."
(2.) If payments have been made, insert the word "except," followed by a statement of the payments.
(3.) If there are set-offs, etc., insert the word "except," followed by a statement of the set-offs, etc.

(Endorsed) No. 19005 United States District Court, Northern District of Illinois In Bankruptcy. In the Matter of Frank E. Scott Transfer Company Bankrupt. Proof of Debt Due Corporation. Of Chicago Auditorium Association Amount of Debt, $6537 94/100 Received and allowed by me this ..... day of ..... A. D. 190 . .....
Referee. Filed at ..... o'clock ..... M., this .....
day of ..... 190 . ..... Clerk.
Matz, Fisher & Boyden Attorney .

t A. 4 EXHIBIT A

This Agreement, Made and entered into this first day of February, A. D. 1911, by and between Chicago Auditorium Association, party of the first part, and Frank E. Scott Transfer Company, party of the second part, Witnesseth:

That, in consideration of the covenants and promises and subject to the conditions hereinafter set forth, the party of the first part hereby concedes and grants to the party of the second part, for a term beginning on the first day of February, 1911, and ending on the thirty-first day of January, 1912, the baggage privilege and the livery privilege of the Auditorium Hotel in the City of Chicago; said baggage privilege being the sole and exclusive right, (so far as it is within the legal capacity of the party of the first part to grant the same) to transfer and carry to and from said Auditorium Hotel all trunks, travelling bags and other articles of baggage, and said livery privilege being the sole and exclusive right, (so far as it is within the legal capacity of the party of the first part to grant the same) to transfer and carry to and from said Auditorium Hotel all passengers and persons and to furnish livery to the guests and patrons of said Hotel; but the party of the first part does not guarantee the party of the second part against the interference of other teamsters, carriers or persons with said exclusive privileges and concessions.

And the party of the second part, in consideration of the premises, covenants and agrees to pay to the party of the first part, at the office of said Auditorium Hotel, for the said baggage privileges the sum of Six Thousand Dollars ($6000), in monthly installments of One Hundred dollars ($100) each, payable in advance on the first day of each and every month during the term of said concession, and to furnish to said hotel and to the guests and patrons thereof, at all times dur-

ing the continuance of said concession, prompt and efficient baggage service at reasonable rates. The party of the second part further covenants and agrees to pay to the party of the first part for said livery privilege, at the office of said Auditorium Hotel, the sum of Fifteen Thousand Dollars ($15,000), in monthly installments of Two Hundred and Fifty Dollars ($250) each, payable in advance on the first day of each and every month during the term of said livery concession, and to furnish to said Hotel and to the guests and patrons thereof, at all times during the continuance of said livery concession, prompt and efficient service at reasonable rates.

The party of the first part, however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so cancelled and revoked.

Said rights and concessions shall not be assignable without the express written consent of the party of the first part, nor shall the assignment of the same, with such written consent, relieve the party of the second part from liability on the covenants and agreements of this instrument.

If the party of the second part shall make default in the payment of any installment of money hereby required to be paid, at the time and place when and where the same is payable, or shall make default in performance of any other covenant or promise hereof to be performed by said party, and such default shall continue for thirty (30) days, the privileges and concessions hereby granted, or either of them, shall, at the option of the party of the first part and without notice, at once cease and determine, and the exercise of said option as reserved in this paragraph shall in no wise release the party of the second part from liability upon its covenants herein contained. If either or both of said privileges and concessions shall, by the option given in this paragraph, be terminated before the said thirty-first day of

t A. January, 1916, the party of the first part may sell at public or private sale, with or without notice, all or any of the rights, concessions and privileges under this instrument for the remainder of said term; or the said party of the first part may, at its option make any new or different contract for the remainder of the said term, or for any longer or shorter time, with respect to the enjoyment of said baggage privilege and livery privilege, or either of them, upon such terms, conditions and inducements as to the party of the first part shall seem expedient. No obligation, however, is imposed upon the party of the first part to make any such sale or to make any other grant or contract with respect to said privileges, and the party of the second part, unless released in writing, shall remain at all times liable for the entire amount by said party of the second part herein agreed to be paid.

In Witness Whereof, the said parties have hereunto set their hands and seals, in duplicate, the date and year first above written.

CHICAGO AUDITORIUM ASSOCIATION,
By R. FLOYD CLINCH,
Prest.

FRANK SCOTT TRANSFER COMPANY,
By E. B. MARTIN
President.

t B. 7 EXHIBIT "B."

Frank E. Scott Transfer Co.,
to
Chicago Auditorium Association, Dr.

Due for Baggage Privilege and Livery Privilege of Chicago Auditorium Hotel under contract of February 1, 1911,			
May 1911	$350.00		
June 1911	350.00		
July 1911	350.00	$1050.00	
Less Credit for Livery charges			
May 1911	281.20		
June 1911	226.25		
July 1911	231.35	738.80	
		311.20	311.20

Exhibit

Damages for breach of Baggage and Livery Privilege Contract, August 1, 1911 to February 1, 1912, estimated as follows:		
Contract	2100.00	
Less amounts received, under new arrangement with other parties at rate of $200 monthly for Livery Privilege and an average of $34.69 monthly for Baggage Privilege August 1, 1911 to February 1, 1912.	1408.14	
Damages,	691.86	691.86
Damage for breach of Baggage and Livery Contract, February 1, 1912 to February 1, 1916, estimated as follows:		
Contract price	16800.00	
Less probable receipts for Baggage and Livery Privilege calculated on basis of receipts from August 1, 1911 to February 1, 1912. February 1, 1912 to February 1, 1916 at $234.69 a month,	11265.12	
Damages	5534.88	5534.88
Total claim		6537.94

8 Endorsed: No. 19005 United States District Court, Northern District of Illinois. In Bankruptcy. In the matter of Frank E. Scott Transfer Company, Bankrupt. Proof of Debt Due Corporation of Chicago Auditorium Association. Amount of Debt $6537.94. Filed at 2:30 o'clock P. M. Feb. 28, 1912, Frank L. Wean, Referee.

9 And afterwards, to wit, on the 2nd day of March, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, Objections of Trustee to Claim of Chicago Auditorium Association; same being in the words and figures following, to wit:

tions. 10 IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois.

Eastern Division.

In Bankruptcy.

In Re Frank E. Scott Transfer Co., Bankrupt. } No. 19005.

OBJECTIONS OF THE CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE OF SAID ESTATE, TO THE CLAIM OF THE CHICAGO AUDITORIUM ASSOCIATION, FILED FOR $6537.94.

Comes now the Central Trust Company of Illinois, trustee of said estate, by Silber, Isaacs, Silber & Woley, its attorneys, and objects to the allowance of the above entitled claim and for grounds of objection says:—

1. That said claim is filed in an excessive amount.

2. That the larger part of said claim is based upon speculative damages, which are not provable or allowable as a claim against the bankrupt's estate.

3. That the claimant is not entitled to the allowance of any claim against the bankrupt.

4. That said claim is otherwise improper, informal and insufficient and should be either expunged or reduced.

CENTRAL TRUST COMPANY OF ILLINOIS
By SILBER, ISAACS, SILBER & WOLEY.
Its Attorneys.

Chicago, March 1, 1912.

11 Endorsed: G. No. 19005. U. S. District Court, Northern District of Illinois. In Bankruptcy. In re Frank C. Scott Transfer Co., Bankrupt. Objections of Trustee to claim of Chicago Chicago Auditorium Association. Filed at 2:30 o'clock P. M. March 2, 1912. Frank L. Wean, Referee in Bankruptcy.

12 And afterwards, to wit, on the 9th day of October, A. D. 1912, the following order was had and entered of record in said cause, to wit:

Order 9, 19

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

In Bankruptcy.

In the matter of
Frank E. Scott Transfer Company, a corporation, bankrupt. } No. 19005.

ORDER.

At Chicago, in the District and Division aforesaid, before Frank L. Wean, Referee in Bankruptcy, this 9th day of October, A. D. 1912.

This cause coming on this day for hearing, on the claim of Chicago Auditorium Association, filed herein on the 28th day of February, A. D. 1912, as an unsecured claim, against said estate in the sum of .....$6537.94 and on the objections thereto of Central Trust Company of Illinois, Trustee herein and both of said parties appearing by counsel;

And the Court having heard the arguments of counsel, and being fully advised in the premises, finds, from a consideration of said claim as filed, that said claimant, Chicago Auditorium Association has not a provable claim against said bankrupt estate, except as to the sum of $311.20;

Wherefore it is Ordered Adjudged and Decreed, that the objections of the Central Trust Company of Illinois, Trustee herein, be and they are hereby sustained, as to all of the claim of the Chicago Auditorium Association, except as to the sum of $311.20, and it is further Ordered, Adjudged and Decreed that the claim of said Chicago Auditorium Association be and the same hereby is allowed as a general, unsecured claim against the estate of said bankrupt, in the said sum of $311.20.

FRANK L. WEAN,
Referee in Bankruptcy.

13 And afterwards, to wit, on the 19th day of October, A. D. 1912, there was filed in said Court, a Petition for Review; same being in the words and figures following, to wit: (omitting the copy of the Referee's order of October 9, 1912, in accordance with stipulation).

14 In the District Court of the United States
Northern District of Illinois
Eastern Division } In Bankruptcy.

In Re Frank E. Scott Transfer Company, Bankrupt. } No. 19005.

Your petitioner, Chicago Auditorium Association, a corporation organized under the laws of the State of Illinois, respectfully shows, as follows:

That your petitioner is a creditor of Frank E. Scott Transfer Company, the above mentioned bankrupt, and that a portion of its claim filed herein on the Twenty-eighth day of February, A. D. 1912 has been allowed, but that a portion of said claim was disallowed by an order made and entered herein on the Ninth day of October, A. D. 1912, a copy of which order is hereto attached;

That such order was and is erroneous in that said order disallowed that portion of said claim which was for damages occasioned by the breach of baggage and livery privilege contract, caused by reason of the bankruptcy of said Frank E. Scott Transfer Company which contract was entered into between your petitioner and said Frank E. Scott Transfer Company on the First day of February, A. D. 1911, and is a part of said petitioner's claim filed herein; that said order disallowing any damages for said breach of said contract caused by said contract was and is erroneous as a matter of law in that said order found that your petitioner had not a provable claim against said bankrupt estate for any damages for said breach of contract, whereas, as a matter of law, your petitioner has a good and provable claim against said bankrupt estate for all damages which accrued to your petitioner when,

15 by reason of the bankruptcy of the said Frank E. Scott Transfer Company, and by reason of the refusal of the Trustee in Bankruptcy of said bankrupt to perform said contract, said bankrupt was unable and failed to perform said contract.

Wherefore your petitioner prays that said order may be reviewed, reversed and remanded, and that your petitioner be restored to all his rights and privileges which he has lost by reason of said error.

CHICAGO AUDITORIUM ASSOCIATION
By A. W. SAWYER
Secretary of Chicago Auditorium Association.

State of Illinois
County of Cook } ss.
City of Chicago

I, A. W. Sawyer, do hereby certify that I am Secretary of Chicago Auditorium Association and the person who as said Secretary subscribed and swore to the claim of said corporation filed herein, and that as Secretary of said Chicago Auditorium Association, the petitioner mentioned and described in the foregoing petition, I do hereby make solemn oath that the statements of fact therein contained are true according to the best of my knowledge, information and belief.

A. W. Sawyer,
Secretary of Chicago Auditorium Association.

Subscribed and sworn to before me this 18th day of October, A. D. 1912.

William D. Bangs
Notary Public.

16 Endorsed: Gen. No. 19005. In the District Court of the United States, Northern District of Illinois, Eastern Division. In re Frank E. Scott Transfer Co., Bankrupt. Petition for Review. Filed at 10 o'clock A. M. Oct. 19, 1912. Frank L. Wean, Referee.

17 And afterwards, to wit, on the 26th day of October, A. D. 1912, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Certificate of Referee to Judge; same being in the words and figures following, to wit:— Certi refe

In the District Court of the United States

For the Northern District of Illinois.

In the Matter of
Frank E. Scott Transfer Co., Bankrupt. } In Bankruptcy. No. 19005.

CERTIFICATE BY REFEREE TO JUDGE.

I, Frank L. Wean, one of the referees of said Court in bankruptcy, do hereby certify that in the course of the pro-

ificate of feree.

ceedings in said cause before me, the following question arose pertinent to the said proceedings:

On February 28th, 1912, there was filed herein a certain proof of claim of the Chicago Auditorium Association, for $6537.94.

On March 2nd, 1912, there was filed herein on behalf of the Central Trust Company of Illinois, trustee, a certain Specification of Objections to the said claim of the Chicago Auditorium Association.

Thereafter, on the 9th day of October, 1912, after hearing and considering the arguments of counsel upon the said Proof of Claim and the aforesaid Objections thereto, and without other evidence, there was entered of record by the referee, a certain order, a true copy of which order is attached to the petition for Review hereinafter referred to.

Thereafter, on October 19th, 1912, there was filed herein, a certain Petition for Review on behalf of the Chicago Auditorium Association, which Petition for Review, together with the aforesaid Proof of Claim filed February 28th, 1912, and the Objections of the Trustee to said Proof of Claim, filed March 2nd, 1912, are herewith transmitted to the Clerk of this Court as a part of this Certificate, and the question thus raised, is certified to the Judge for his opinion thereon.

Dated at Chicago, the 25th day of October, 1912.

18

FRANK L. WEAN,
Referee in Bankruptcy.

Endorsed: No. 19005. U. S. District Court, Northern District of Illinois. In the matter of Frank E. Scott Transfer Co., Bankrupt. Certificate by Referee to Judge. Filed Oct. 26, 1912, at 10 o'clock A. M. T. C. MacMillan, Clerk.

19 And afterwards, to wit, on the 17th day of May, A. D. 1913, the following order was had and entered of record in said cause, to wit:

Order c
17, 1

In re
Frank Scott Transfer Co., } No. 19005.
Bankrupt.

The Court having considered and being now fully advised in the matter of the objections of the Chicago Telephone Co., and the Chicago Auditorium Association to review the order heretofore entered herein by Referee in Bankruptcy F. L. Wean, it is Ordered by the Court that the order entered herein by said Referee disallowing the claims of said petitioners be and the same is hereby confirmed.

20 And afterwards, to wit, on the 27th day of May, A. D. 1913, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Assignment of Errors; same being in the words and figures following, to wit: Filed 1913

21 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

In the Matter of
Frank E. Scott Transfer Company,
a corporation,
Bankrupt.
Claim of Chicago Auditorium Association. } In Bankruptcy No. 19005.

Now comes Chicago Auditorium Association, a creditor of the above named bankrupt, and respectfully represents.

That in a certain matter lately pending in this Court, in the matter of the bankruptcy of the above named Scott Transfer Company, said Chicago Auditorium Association filed a claim against the Estate of said bankrupt on the 28th day of February, A. D. 1912, in the amount of Six Thousand, Five Hundred Thirty-seven Dollars and Ninety-four Cents ($6537.94); that on the 1st day of October, A. D. 1912, the Central Trust Company of Illinois, Trustee in Bankruptcy of said Scott Transfer Company, filed objections to said claim; that on the 9th day of October, A. D. 1912, an Order was entered by the Hon. Frank L. Wean, the Referee in

d May 27, 913.

Bankruptcy to whom said cause was referred, sustaining the objections of the Central Trust Company to said claim of the Chicago Auditorium Association, except as to the sum of Three Hundred and Eleven Dollars and Twenty Cents ($311.20), as to which amount said claim was allowed; that on the 19th day of October, A. D. 1912, the said Chicago Auditorium Association filed a petition for a review of said Order, which said petition was granted; that on the 24th day of October, A. D. 1912, the said Referee in Bankruptcy prepared and filed a certificate setting forth the question presented for review, the final order of the Referee thereon and all the papers pertaining thereto; that on the 17th day of May, A. D. 1913, the Hon. Kenesaw M. Landis, one of the Judges of this Court, entered an order approving and confirming the order of Referee Wean aforesaid; that in the
22 rendition and entry of said order of May 17th, 1913, there were manifest errors to the injury of said Chicago Auditorium Association as said claimant, which said manifest errors are as follows:

1. That the Court erred in entering said order of May 17th, 1913, approving and confirming said order of Referee Wean of October 9th, 1912, which said order disallowed a portion of said claim of said Chicago Auditorium Association, amounting to the sum of Six Thousand, Two Hundred Twenty-six Dollars and Seventy-four Cents ($6226.74), and held that said portion of said claim so disallowed was not a provable debt against the Estate of said bankrupt.

2. That the Court erred in not overruling said order of Referee Wean of October 9th, 1912, which said order disallowed a portion of said claim of said Chicago Auditorium Association, amounting to the sum of Six Thousand, Two Hundred Twenty-six Dollars and Seventy-four Cents ($6226.74), and held that said portion of said claim so disallowed was not a provable debt against the Estate of said bankrupt.

3. That the Court erred in not overruling said order of Referee Wean of October 9th, 1912, which said order disallowed a portion of said claim of said Chicago Auditorium Association, amounting to Six Thousand, Two Hundred Twenty-six Dollars and Seventy-four Cents, and held that said portion of said claim so disallowed was not a provable debt against the Estate of said bankrupt, and in not returning said claim of said Chicago Auditorium Association to Referee Wean with instructions to overrule the said objec-

tions of said Central Trust Company, Trustee in Bankruptcy of said bankrupt, and to allow the whole of said claim when the unliquidated portion thereof is properly liquidated. Filed 191

Wherefore, said Chicago Auditorium Association, as said claimant, prays that for the manifest errors aforesaid, the said order of May 17th, 1913 of the District Court of the United States, for the Northern District of Illinois, Eastern Division, be reversed and annulled and altogether held
23 for naught, and that the above entitled matter may be remanded to said District Court with directions to said Court to overrule the said order of Referee Wean of October 9th, 1912, and to return said claim of said Chicago Auditorium Association to said Referee, with instructions to said Referee to overrule the objections of the Central Trust Company, Trustee in Bankruptcy of said bankrupt, to said claim, and with instructions to said Referee to allow the whole of said claim when the unliquidated portion thereof is properly liquidated; and that said claimant and appellant do have and recover its costs upon this appeal.

Dated Chicago, Illinois, May 27th, 1913.

MATZ, FISHER AND BOYDEN
Solicitors for Chicago Auditorium Association, Claimant.

24 Endorsed: In Bankruptcy. No. 19005. In the District Court of the United States for the Northern District of Illinois, Eastern Division. In the matter of Frank E. Scott Transfer Company, Bankrupt. Claim of Auditorium Association. Assignment of Errors. Filed May 27, 1913 T. C. MacMillan, Clerk.

25 And afterwards, to wit, on the 27th day of May, A. D. 1913, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Petition for Appeal; same being in the words and figures following, to wit:—

Filed May 27, 1913. 26 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

In the Matter of Frank E. Scott Transfer Company, a corporation, bankrupt.
Claim of Chicago Auditorium Association.
} In Bankruptcy No. 19005.

To the Honorable Judges of the District Court of the United States, for the Northern District of Illinois, Eastern Division.

Now, by its Solicitors Matz, Fisher and Boyden, comes Chicago Auditorium Association, a corporation, a creditor of the above named bankrupt, and having filed with the Clerk of this Court an assignment of errors in the above entitled matter, prays this Honorable Court to allow an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from an order entered in the above entitled matter on the 17th day of May, A. D. 1913 by the Hon. Kenesaw M. Landis, one of the Judges of this court, approving an order entered on the 9th day of October, A. D. 1912 by Hon. Frank L. Wean, Referee in Bankruptcy, sustaining the objections of the Central Trust Company, Trustee in Bankruptcy of the above named Bankrupt, to all of the claim of the said Chicago Auditorium Association, amounting to Six Thousand, Five Hundred Thirty-seven Dollars and Ninety-four Cents ($6537.94) filed against the Estate of said bankrupt, except as to the sum of Three Hundred Eleven Dollars and Twenty Cents ($311.20) thereof, and from each and every part of such order, and that a transcript of the record, proceedings, and documents upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit.

Dated at Chicago, Illinois, May 27th, A. D. 1913.

MATZ, FISHER AND BOYDEN
Solicitors for Chicago Auditorium Association.

27 Endorsed: In Bankruptcy No. 19005. In the District Court of the United States for the Northern District of Illinois. Eastern Division. In the matter of Frank E. Scott Transfer Co., a corporation, Bankrupt. Claim of Chicago Auditorium Association. Petition for Appeal. Filed May 27, 1913. T. C. MacMillan, Clerk.

And afterwards, to wit, on the 27th day of May, A. D. 1913, the following order was had and entered of record said cause, to wit: Order 27.

re
Frank E. Scott Transfer Company, a corporation, Bankrupt. } No. 19905.

On the petition of the Chicago Auditorium Association, a creditor of the above named bankrupt, which petition prays for the allowance of an appeal in the above entitled matter to the United States Circuit Court of Appeals for the Seventh Circuit, and it appearing to the Court that the said creditor, the Chicago Auditorium Association, has filed its assignment of errors, as required by the rules of the United States Circuit Court of Appeals for the Seventh Circuit.

It Is Ordered that the said appeal be, and the same is hereby allowed as prayed for, and that a certified transcript of the record, proceedings, and documents herein be forthwith transmitted to said United States Circuit Court of Appeals for the Seventh Circuit, as per praecipe, to be filed herein.

It Is Further Ordered that said appellant, Chicago Auditorium Association, give bond in the sum of two hundred and fifty Dollars ($250.00), as required by law and the rules and practice of said United States Circuit Court of Appeals for the Seventh Circuit, with a surety or sureties to be approved by this Court.

And afterwards, to wit, on the 27th day of May, A. D. 1913, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bond on Appeal; said Bond being in the words and figures following, to wit: — Bond

Know All Men by These Presents, That we Chicago Auditorium Association, a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, as sureties, are held and firmly bound unto Central Trust Company of Illinois, a corporation, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt, in the full and just sum of Two hundred and Fifty Dollars to be paid to the said Central Trust Company of Illinois, a corporation, Trustee of the Estate of Frank E. Scott Transfer Company, Bank-

on appeal. rupt, its successors, attorneys, or assigns; to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 27th day of May in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, in the matter of Frank E. Scott Transfer Company, a corporation, Bankrupt, the said Chicago Auditorium Association filed a claim against the estate of said bankrupt, a portion of which was disallowed by the Referee in Bankruptcy to whom said cause was referred, and the order of the referee disallowing a portion of said claim was confirmed and approved by an order of the said District Court entered May 17th, 1913, and the said Chicago Auditorium Association having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and filed a copy thereof in the Clerk's Office of said Court to reverse the decree of the aforesaid suit, and a citation directed to the said Chicago Auditorium Association citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such That if the said Central Trust Company of Illinois, Trustee of the estate of Frank E. Scott Transfer Company Bankrupt, shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

CHICAGO AUDITORIUM ASSOCIATION
By R. FLOYD CLINCH, (Seal)
Prest.

Attest
A. W. SAWYER,
Sec'y.

UNITED STATES FIDELITY AND GUARANTY COMPANY (Seal)
By FRANK J. GAULTER,
Attorney in Fact.

Approved by
K. M. L.

30 Endorsed: 19005. Circuit Court of the United States Northern District of Illinois Eastern Division Bond on Appeal Filed May 27th, 1913 T. C. MacMillan, Clerk.

2 And afterwards, to wit, on the 16th day of June, A. D. Filed J
1913, there was filed in the Clerk's Office of said Court, 1913.
n the above entitled cause, a Stipulation; said Stipulation
eing in the words and figures following, to wit:—

Copy

3 In the District Court of the United States

For the Northern District of Illinois

Eastern Division.

n the Matter of Frank E. Scott Transfer Company, a corporation, bankrupt. laim of Chicago Auditorium Association.	In Bankruptcy No. 19005.

It is hereby stipulated by and between the parties hereto, by their respective counsel, that in lieu of a written praecipe, the return of the Clerk of the District Court of the United States to be transmitted by him upon the Appeal of Chicago Auditorium Association, be comprised of and contain a transcript of the following records, files and proceedings of the United States District Court, for the District and Division aforesaid.

First: The claim of the Chicago Auditorium Association against the estate of the aforesaid bankrupt, filed February 8th, 1912.

Second: The objections of the Central Trust Company of Illinois, Trustee of the estate of the aforesaid bankrupt, to the claim of the Chicago Auditorium Association, filed March 2nd, 1912.

Third: The order of Frank L. Wean, Referee in Bankruptcy, dated October 9th, 1912, sustaining the objections of the Central Trust Company of Illinois, Trustee of the estate of the aforesaid bankrupt, as to a portion of the said claim of the Chicago Auditorium Association.

Fourth: The petition of the Chicago Auditorium Association for a review by the District Court of the order of Referee Wean entered October 9th; omitting the copy of the Referee's order of October 9th, 1912.

Fifth: The certificate of Referee Wean certifying to the

d June 16, 913. District Court the question presented on the review of said order of October 9th, 1912.

34 Sixth: The order of the District Court entered May 17th, 1913, approving and confirming the said order of Referee Wean entered October 9th, 1912.

Seventh: The Assignment of Errors by the Chicago Auditorium Association.

Eighth: The petition of the Chicago Auditorium Association to the District Court praying an appeal to the United States Circuit Court of Appeals of the Seventh Circuit, in the Assignment of Errors aforesaid.

Ninth: The order of May 27th, 1913 of the District Court allowing said appeal.

Tenth: The bond of the Chicago Auditorium Association on said appeal.

Eleventh: Citation to said Central Trust Company of Illinois, Trustee.

Twelfth: This stipulation.

SILBER, ISAACS, SILBER & WOLEY
Solicitors for Central Trust Company of Illinois, Trustee of the Estate of Scott Transfer Company, Bankrupt.

MATZ, FISHER AND BOYDEN
Solicitors for Chicago Auditorium Association.

35 Endorsed: In Bankruptcy No. 19005. In the District Court of the United States, for the Northern District of Illinois, Eastern Division. In the matter of Frank E. Scott Transfer Company, Bankrupt. Claim of Chicago Auditorium Association. Stipulation. Filed June 16, 1913, at ..... o'clock ..... M. T. C. MacMillan, Clerk.

tificate of Clerk. 36 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true, complete and correct transcript of the record in re Frank E. Scott Transfer Com-

pany, a Corporation, Bankrupt—Claim of Chicago Auditorium Association, prepared in accordance with Stipulation filed herein and attached hereto, as same appears from the records and files in said cause now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office at Chicago, in said District, this 24th day of June, A. D. 1913.

T. C. MacMillan,
Clerk.

(Seal)

31 United States of America, } ss.

The President of the United States, To Central Trust Company of Illinois, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an appeal in the District Court of the United States, for the Northern District of Illinois, Eastern Division, wherein Chicago Auditorium Association, a creditor of the above named bankrupt, is appellant and you are appellee, to show cause, if any be, why the order entered in the above entitled matter on May 17th, 1913, confirming and approving an order of the Referee which disallowed a portion of the claim of said Chicago Auditorium Association, should not be reversed and speedy justice done to the parties in their behalf.

Witness the Honorable Kenesaw M. Landis Judge of the District Court of the United States, this 27th day of May, in the year of our Lord one thousand nine hundred and Thirteen.

Kenesaw M. Landis

We accept service of this citation this 27th day of May, A. D. 1913.

Central Trust Company of Illinois,
Trustee of the Estate of Frank E. Scott Transfer Company, bankrupt.
By Silber, Isaacs, Silber & Woley,
Its Solicitors.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 21, inclusive, contain a true copy of the printed record, printed under my supervision, and filed July 24, 1913, on which this cause was argued, heard and determined in the case of In the Matter of Frank E. Scott Transfer Company, Bankrupt, Chicago Auditorium Association vs. Central Trust Company of Illinois, Trustee, No. 2020, October Term, 1912, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-first day of May, A. D. 1914.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Courtroom, in the City of Chicago, in said Seventh Circuit, on the First Day of October, 1912, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Twelve and of Our Independence the One Hundred and Thirty-seventh Year.

And afterwards, to-wit:—On the twenty-fifth day of June, 1913, in the October Term last aforesaid, came the Appellant, by its counsel, Mr. Rudolph Matz and Mr. William D. Bangs, and filed in the office of the clerk of this court their appearance, which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1912.

No. 2020.

In the Matter of FRANK E. SCOTT TRANSFER CO., Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION, Appellant,
vs.
CENTRAL TRUST CO. OF ILLINOIS, Trustee, Appellee.

The Clerk will enter *my* appearance as counsel for the Appellant.
RUDOLPH MATZ.
WILLIAM D. BANGS.

Endorsed: Filed June 25, 1913. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the twenty-seventh day of June, 1913, in the October Term last aforesaid, came the Appellee, by its counsel, Mr. F. D. Silber, Mr. M. J. Isaacs, Mr. C. J. Silber and Mr. J. D. Woley, and filed in the office of the clerk of this Court their appearance, which appearance is in the words and figures following, to-wit:—

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1912.

No. 2020.

In the Matter of FRANK E. SCOTT TRANSFER CO., Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION, Appellant,
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee, etc., Appellee.

The Clerk will enter *my* appearance as counsel for the Appellee.

F. D. SILBER.
M. J. ISAACA.
C. J. SILBER.
J. D. WOLEY.

Endorsed: Filed June 27, 1913. Edward M. Holloway, Clerk.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held at the United States Courtroom, in the City of Chicago, in said Seventh Circuit, on the Seventh Day of October, 1913, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Thirteen, and of Our Independence the One Hundred and Thirty-eighth Year.

And afterwards, to-wit: On the seventh day of October, 1913, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

TUESDAY, October 7, 1913.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

2020.

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt;
CHICAGO AUDITORIUM ASSOCIATION
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing on October 17, 1913.

And afterwards, to-wit: On the seventeenth day of October, 1913, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

FRIDAY, October 17, 1913.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Hon. George A. Carpenter, District Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before Hon. Francis E. Baker, Circuit Judge, presiding; Hon. William H. Seaman, Circuit Judge; Hon. Julian W. Mack, Circuit Judge.

2020.

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt;
CHICAGO AUDITORIUM ASSOCIATION
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of Mr. William D. Bangs, counsel for Appellant, it is now here ordered that the certificate of the Clerk of the District

Court of the United States for the Northern District of Illinois, Eastern Division, as to the dates of bankruptcy and adjudication in the Matter of Frank E. Scott Transfer Company, Bankrupt, be, and the same is hereby made a part of the record in this cause in this Court.

2020.

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt;
CHICAGO AUDITORIUM ASSOCIATION
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr. Rudolph Matz and Mr. William D. Bangs, counsel for Appellant, and by Mr. Fred D. Silber, counsel for Appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the fifteenth day of January, 1914, in the October Term last aforesaid, there was filed in the office of the clerk of this Court, the Opinion of the Court in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term and Session, 1913.

No. 2020.

In re FRANK E. SCOTT TRANSFER COMPANY, Bankrupt;
CHICAGO AUDITORIUM ASSOCIATION, Appellant,
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before Baker, Seaman and Mack, Circuit Judges.

This appeal is from an order of the District Court in bankruptcy, confirming an order of the Referee, which disallows a claim filed by the appellant for damages arising out of alleged anticipatory breach of an executory contract entered into by the bankrupt, and allows only the portion of such claim as presented for $311.20, which had accrued under the contract when bankruptcy intervened.

The contract in question is thus described in the brief for appellant:

"By the terms of said contract, entered into February 1, 1911, the Association granted to the Transfer Company the exclusive baggage and livery privilege of the Auditorium Hotel, in the City of Chicago, for a period of five years from the date of the contract. This exclusive privilege was stated in the contract to consist of the sole and exclusive right, so far as it was within the legal capacity of the Association to grant, to transfer and carry to and from the said hotel all articles of baggage, and all passengers and persons, and to furnish livery to the guests and patrons of the hotel. In consideration of this grant by the Association, the Transfer Company agreed to furnish prompt and efficient livery and baggage service at reasonable rates during the continuance of the contract, and to pay the Association the sum of $6,000 for the baggage privilege, and the sum of $15,000 for the livery privilege, a total of $21,000, payable in monthly installments of $350. This contract was carried out by both parties thereto, up to and including the date on which the petition in bankruptcy was filed against the Transfer Company."

This statement of the contract is incomplete, however, as it further provides, in favor of the appellant, as "party of the first part," as follows:

"The party of the first part, however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so cancelled and revoked."

SEAMAN, *Circuit Judge*, delivered the opinion of the court:

The single question for review on this appeal is, Whether the claim for damages, predicated on an alleged anticipatory breach of the executory contract in suit, constitutes a provable claim in bankruptcy. It does not appear to be met and answered by any decision of the Supreme Court called to our attention, and if not free from difficulty under various other authorities cited, we believe its solution lies within narrow compass—hinging upon the tenability of the appellant's contentions of the legal effect of the bankruptcy proceedings: (*a*) that they produced an anticipatory breach of the bankrupt's contract to furnish livery-and-baggage-service as provided, and (*b*) thus created simultaneous liability of its estate in bankruptcy for damages so arising.

The general doctrine of anticipatory breach of an executory contract whenever the contractor disenables himself from performance

is well established—Lovell v. St. Louis Life Ins. Co., 111 U. S. 264, 274; Roehm v. Horst, 178 U. S. 1, 7 and cases reviewed—and its application when the contractor "becomes bankrput and goes into liquidation" is upheld in Carr v. Hamilton, 129 U. S. 252, 256, in reference to a policy of life insurance, for the reason that the company thereby "becomes civiliter mortuus, its business is brought to an absolute end." It has likewise been pronounced applicable to an executory contract "broken by the insolvency of the Railway Companies and the appointment of receivers" thereof, whenever the receivers reject the contract, and that in such event the "rejection relates back to the beginning of the receivership." Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 736, 744; C. C. A., 2nd Circuit.

Upon the concrete question presented in this case, however, whether intervention of bankruptcy constitutes such breach for which damages are provable therein, considerable diversity appears in various rulings of the District Courts, as reported, in the administration of bankruptcy under the present Acts; and it is contended for support of the ruling herein against that proposition that several decisions in the Circuit Court of Appeals of other circuits (Watson v. Merrill, 136 Fed. 359, 5th Circuit; In re Roth & Appel 181 Fed. 667, 2nd Circuit; Colman Co. v. Withhoft, 195 Fed. 250, 9th Circuit), disallowing claims for rent or damages accruing subsequent to bankruptcy under leases held by the bankrupt, are applicable and of controlling weight and force. On the other hand, two decisions of like appellate tribunals are cited (In re Swift, 112 Fed. 315, 1st Circuit; In re Neff, 157 Fed. 57, 6th Circuit) as direct authorities for upholding provability of the claim in controversy.

Laying aside for the moment the first mentioned line of authorities and their distinction from the present issue, we proceed to consideration of In re Swift, supra, and In re Neff, supra, and the doctrine of anticipatory breach of contract arising from bankruptcy upheld in both cases. In the Swift case, the bankrupt as stockholder had purchased stocks for the claimant and was "carrying the same on margin," when the broker petitioned for adjudication as a bankrupt, after having made a voluntary assignment. The opinion delivered by Judge Putnam discusses the contentions whether the date or fact of voluntary assignment or of proceedings in bankruptcy was controlling and rules, in effect, that the fact of voluntary assignment became immaterial, and that the issue of anticipatory breach rested on the legal effect of the bankruptcy proceedings—citing Lovell v. Ins. Co., supra, and other authorities. Thereupon it is held that proceedings in bankruptcy "rendered unnecessary a demand for tender" and the "proof of debt relates to the time when they were commenced"; that "the contract ripened simultaneously with the beginning of the proceedings in bankruptcy, as the consequence thereof in connection with the adjudication which followed." In the Neff case the opinion is by Mr. Justice Lurton, then Circuit Judge, in reference to an executory contract on the part of the bankrupt to purchase certain stocks two years after date at a price named. Bankruptcy intervened before maturity and claim was

filed for recovery, under a stipulation of fact that the corporations issuing the stock "were insolvent before the bankruptcy of said Neff, and that this stock was of no value." The doctrine of anticipatory breach is defined (with numerous citations), and its application for allowance of the claim is then stated: "Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance"; and it is sufficient for allowance, "that a claim becomes provable in consequence of bankruptcy." The opinion cites and approves the above mentioned Swift case, and the excellent opinion of Judge Lowell in the District Court, reported as In re Pettingill Co., 137 Fed. 143, 147.

We are of opinion that these decisions are well founded, both in their definition of the general doctrine referred to and in respect of the instantaneous effect of proceedings in bankruptcy for anticipatory breach of the unperformed contract, unless the trustee in bankruptcy elects performance thereof in the interest of the estate; and that it is equally applicable, whether the proceedings are voluntary or involuntary, notwithstanding the distinction in that particular suggested in one or more of the District Court citations. Provability of the claim for damages rests on this instantaneous legal effect of the proceedings, as no subsequent breach can authorize the claim. It is thus brought within clause 4 of section 63*a*, which includes all indebtedness founded upon contract existing "at the time of the filing of the petition in bankruptcy"—Zavelo v. Reeves, 227 U. S. 625, 631—to be liquidated pursuant to section 63*b*. Whether the trustee may have authority to carry out the contract in question, if he so elects, is not involved for consideration, as no such election is set up, and it is plain that any right which may be conferred to that end by the Bankruptcy Act lends no force to the appellee's contention that the claim presented was for a contingent liability. The liability arising under the breach of this contract was direct, and in no sense contingent, nor affected by the ruling in Dunbar v. Dunbar, 190 U. S. 340, 344, cited in support of the contention, except as hereinafter stated.

In reference to the above mentioned authorities disallowing claims for breach of leasehold contract arising through bankruptcy, each must rest for approval on the distinction well pointed out in the opinion of the Circuit Court of Appeals of the 2nd Circuit—In re Roth and Appel, 181 Fed. 667—between the relation and rights of lessor and lessee of realty under such instruments and the rights of the contracting parties under general executory contracts. This distinction is observed as well in a note appended to the opinion in Pennsylvania Steel Co. v. New York City Ry. Co., supra; and thereupon these rulings become inapplicable to the present inquiry.

Our conclusion is, therefore, that damages for anticipatory breach of the contract are provable under the claim presented, and that error is well assigned for disallowance of the entire claim. It appears from the contract, however, as exhibited with the claim, that it reserves in favor of the appellant an option "to cancel and re-

voke either or both of said privileges" granted by the contract "by giving six months' notice in writing of its election so to do," and that both parties shall "in that case be released from further liability" at the expiration of the six months. Under this provision the contract is mutually obligatory for a term of six months only, and uncertain and without force for any longer term of service in futuro, within Dunbar v. Dunbar, supra, and authorities cited. Thus no damages for breach are provable beyond such period.

The order of the District Court is reversed, accordingly, with direction to reinstate the claim and proceed therein in conformity with this opinion.

A true Copy.

Teste:

____ ____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And afterwards, on the same day, to-wit: On the fifteenth day of January, 1914, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, January 15, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

2020.

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said District Court in this cause appealed from, be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to

the said District Court with direction to re-instate the claim and proceed therein in conformity with the opinion of this Court.

And afterwards, to-wit: On the thirteenth day of February, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Modification of Judgment, which said Petition is not copied here nor made a part of this record.

And afterwards, on the same day, to-wit: On the thirteenth day of February, 1914, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

FRIDAY, February 13, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

2020.

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellant, it is ordered that the time for filing a Petition for Rehearing in this cause be, and the same is hereby extended to and including February 21, 1914.

And afterwards, to-wit: On the twenty-first day of February, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Rehearing, which said Petition for Rehearing is not copied here nor made a part of this record.

And afterwards, to-wit: On the twentieth day of April, 1914, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

MONDAY, April 20, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

2020.

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Ordered: that findings of fact and conclusions of law thereon in the above appeal be and the same are hereby made and filed by this Court, as follows:

Findings of Fact.

1. That an adjudication of bankruptcy was entered by the District Court against Frank E. Scott Transfer Company, a corporation, on August 7, 1911, pursuant to a creditors' petition, filed against it July 22, 1911.

2. That the appellant, Chicago Auditorium Association, on February 28, 1912, exhibited its proof of debt against the bankrupt estate, claiming an unsecured indebtedness of $6,537.94 as a general unsecured claim. Of this amount, $311.20 had accrued upon the contract hereinafter mentioned prior to bankruptcy proceedings and was undisputed and allowed by the trial court. The remaining sum, $6,226.74, was claimed as unliquidated damages arising under the contract for alleged breach thereof on the part of the bankrupt through such bankruptcy proceedings.

3. That the contract in controversy was made between the bankrupt and the appellant on February 1, 1911, whereby the appellant granted to the bankrupt for the term of five years thereafter the exclusive privilege of transferring and carrying to and from the Chicago Auditorium Hotel all articles of baggage and all passengers and persons, and of furnishing livery to the guests and patrons of the hotel, so far as it was within the legal capacity of the appellant to grant the same. For the baggage privilege the bankrupt agreed to pay to the appellant the sum of $6,000 in monthly installments of

$100 each, and for the livery privilege the sum of $15,000 in monthly installments of $250 each on the 1st of each month during the contract period. The contract, however, further provided in favor of the appellant, as party of the first part, as follows: "The party of the first part, however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so cancelled and revoked." The contract also provides that the rights and concessions granted were not assignable without the express written consent of the appellant, and that such assignment with such consent would not relieve the bankrupt from liability on its covenants.

4. That this contract remained in force when bankruptcy intervened on July 22nd, 1911.

5. That after bankruptcy intervened the appellant entered into contract with other parties for performance of the service provided by the contract and obtained therefrom the sum of $234.69 monthly, as compensation for such privileges. And thus, for the period of six months thereafter received $691.86 less than the amount provided by the contract for such period, and suffered damages accordingly.

As Conclusions of Law Thereon.

1. That the intervention of bankruptcy, as recited, constituted anticipatory breach of the contract in suit for which damages are provable in bankruptcy.

2. That the option reserved in favor of the appellant to cancel and revoke the privileges so granted by giving six months' notice in writing of its election so to do, limits the amount recoverable for such breach to such period of six months.

3. That the appellant is entitled to allowance of $691.86 upon the claim in controversy, but its claim in excess thereof was rightly disallowed.

And It Is Further Ordered, that the order of this Court, as heretofore entered herein, be and the same is hereby vacated; and that, in place thereof, it is hereby ordered, that the order of the District Court disallowing the entire claim for anticipatory breach be and the same is hereby reversed, with direction to such Court to allow $691.86 thereof as damages, and to disallow the remaining portion of the claim.

And afterwards, to-wit: On the first day of May, 1914, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

FRIDAY, May 1, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

2020.

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the Petition for Rehearing in this cause be, and the same is hereby overruled.

And afterwards, to-wit: On the eighteenth day of May, 1914, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

MONDAY, May 18, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

2020.

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On application of Mr. Clarence J. Silber, counsel for appellee, it is ordered by the Court that the Certificate allowing an Appeal to

the Supreme Court of the United States herewith presented, be filed in this cause, and that the Clerk of this Court transmit the same to the Supreme Court of the United States.

And afterwards, on the same day, to-wit: On the eighteenth day of May, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, whic his in the words and figures following, to-wit:—

In the Supreme Court of the United States, October Term, A. D. 1913.

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt, Appellant,
vs.
CHICAGO AUDITORIUM ASSOCIATION, Appellee.

Assignment of Errors.

And now comes Central Trust Company of Illinois, Trustee of the estate of Frank E. Scott Transfer Company, a corporation, bankrupt, and files herein the following assignment of errors upon which it will rely, upon its appeal from the judgment of the United States Circuit Court of Appeals, for the Seventh Circuit, in the above entitled cause, being a judgment entered therein on April 20, 1914:

1. For that the said United States Circuit Court of Appeals, for the Seventh Circuit, erred in admitting to proof any part of the claim presented by Chicago Auditorium Association, excepting such portion as had accrued prior to the commencement of bankruptcy proceedings, being the sum of $311.20.

2. For that the said United States Circuit Court of Appeals, for the Seventh Circuit, erred in holding that bankruptcy operates as an anticipatory breach of the contract from which the claim of Chicago Auditorium Association arose, and that such resulting claim for damages is provable against the bankrupt's estate.

3. For that the United States Circuit Court of Appeals for the Seventh Circuit, erred in not disallowing the entire claim of Chicago Auditorium Association, for damages accruing out of the alleged breach of its contract.

4. For that the United States Circuit Court of Appeals for the Seventh Circuit, erred in directing the District Court to allow the claim of the Chicago Auditorium Association, for the sum of $691.86, or any part thereof.

5. For that the United States Circuit Court of Appeals for the Seventh Circuit, erred in reversing the order of the United States District Court, for the Eastern Division of the Northern District of Illinois, and in not affirming said order.

Wherefore, in order that the foregoing assignment of errors may be and appear of record, the said Central Trust Company of Illinois,

as trustee in bankruptcy of the estate of Frank E. Scott Transfer Company, a corporation, bankrupt, presents the same to the Court and prays that such disposition be made thereof, as is conformable with law and the statutes of the United States in such case made and provided.

And the said Central Trust Company of Illinois, as such Trustee, prays that said judgment of the United States Circuit Court of Appeals, for the Seventh Circuit, may be reversed and the judgment of the United States District Court in and for the Eastern Division of the Northern District of Illinois, affirmed.

EDWIN C. BRANDENBURG,
FREDERICK D. SILBER,
CLARENCE J. SILBER,
Attorneys for said Central Trust Company of Illinois, Trustee in Bankruptcy of the Estate of Frank E. Scott Transfer Company, a Corporation, Bankrupt, Appellant.

Endorsed: Filed May 18, 1914. Edward M. Holloway, Clerk.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 19, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel, Petition for Modification of Judgment, Motion for extension of time to file Petition for Rehearing, the Petition for Rehearing and Proof of Service of same; also the Petition for Cross Appeal, Assignment of Errors, Order allowing Cross-Appeal and Bond on Cross-Appeal) in the case of In the Matter of Frank E. Scott Transfer Company, Bankrupt. Chicago Auditorium Association vs. Central Trust Company of Illinois, Trustee. No. 2020, October Term, 1912, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-first day of May A. D. 1914.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

UNITED STATES OF AMERICA, *ss:*

To Chicago Auditorium Association, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit, wherein Central Trust Company of Illinois, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, this thirteenth day of May, in the year of our Lord one thousand nine hundred and fourteen.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

We hereby accept service of the within citation directed to Chicago Auditorium Association, on its behalf and as its attorneys.

CHICAGO AUDITORIUM ASSOCIATION,
By RUDOLPH MATZ,
WILLIAM D. BANGS,
Its Attorneys.

Dated at Chicago, Illinois, this Fifteenth day of May, A. D. 1914.

Filed May 18, 1914. Edward M. Holloway, Clerk.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1912.

No. 2020.

CHICAGO AUDITORIUM ASSOCIATION, Appellant,
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt, Appellee.

The Central Trust Company of Illinois, Trustee of the estate of Frank E. Scott Transfer Company, Bankrupt, conceiving itself aggrieved by the judgment entered herein on the 20th day of April, 1914, in the above entitled proceeding, doth hereby appeal from the said judgment to the Supreme Court of the United States, and prays that this appeal may be allowed; and that a duly authenticated transcript of the record and proceedings and papers upon

which the said judgment was entered, may be sent to the Supreme Court of the United States.

EDWIN C. BRANDENBURG,
FREDERICK D. SILBER,
B.,
CLARENCE J. SILBER,
B.,
Attorneys for Appellee.

Appeal allowed. No bond is required of the trustee. See Bankruptcy Act § 25*c*.

In my opinion the determination of the questions involved herein is essential to a uniform construction of the Bankruptcy Act throughout the United States. See Bankruptcy Act § 25*b*2.

May 13, 1914.

WILLIS VAN DEVANTER,
Associate Justice Supreme Court of the United States.

[Endorsed:] United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1913. No. 2020. In re Frank E. Scott Co., Bankrupt. Certificate Allowing Appeal. Filed May 18, 1914. Edward M. Holloway, Clerk.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held at the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the Seventh Day of October, 1913, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Thirteen and of Our Independence the One Hundred and Thirty-eighth Year.

And afterwards, to-wit: On the eighteenth day of May, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, which is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1913, April Session, 1914.

No. 2020.

In re FRANK E. SCOTT TRANSFER COMPANY, Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION, Appellant,
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now comes Chicago Auditorium Association, the above named appellant by Rudolph Matz and William D. Bangs, its counsel, and

presents and files its assignment of errors in the above entitled cause, as follows:

I. The United States Circuit Court of Appeals for the Seventh Circuit erred in the rendition and entry of its order and decree, entered herein on April 20th, A. D. 1914, directing the District Court of the United States for the Northern District of Illinois, Eastern Division, to disallow the claim of said appellant against the appellee, except the sum of Six Hundred and Ninety-one Dollars and eighty-six cents ($691.86) thereof.

II. The said Court of Appeals erred in not reversing the order of the said District Court disallowing the entire claim of the appellant against the appellee and ordering the District Court to allow the entire claim of the appellant when the unliquidated portion thereof is properly liquidated.

III. The said Court of Appeals erred in making and filing herein its Conclusions of Law II and III.

Wherefore, the said appellant prays that said order and decree of the said Circuit Court of Appeals for the Seventh Circuit, may be reversed and that the said District Court be directed to allow the entire claim of the appellant, as aforesaid.

RUDOLPH MATZ,
WILLIAM D. BANGS,
Counsel for Appellant.

Endorsed: Filed May 18, 1914. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the eighteenth day of May, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court, a certain Petition for Cross-Appeal, which is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1913, April Session, 1914.

No. 2020.

In re FRANK E. SCOTT TRANSFER COMPANY, Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION, Appellant,
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

The above mentioned appellant, Chicago Auditorium Association, by Rudolph Matz and William D. Bangs, its counsel, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Seventh Circuit, and that a decree or order was rendered therein on the 20th day of April, A. D.

1914, reversing the order of the District Court of the Northern District of Illinois, Eastern Division, and directing said District Court to allow the claim of the appellant in controversy in the above entitled cause to the extent of the sum of Six hundred and Ninety-one Dollars and eighty-six cents ($691.86) and to disallow the remaining portion of said claim; that the amount of the remaining portion of the said claim of appellant so disallowed, exceeds the sum of Two Thousand Dollars ($2,000.00) and that the question involved in the consideration of the portion of the claim of the appellant so disallowed is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States.

And said appellants further show that the above mentioned appellee, Central Trust Company of Illinois, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt, has prayed an appeal from that portion of the said decree of said Circuit Court of Appeals, which directed the District Court to allow the sum of Six Hundred and Ninety-one Dollars and eighty-six cents ($691.86), and that said appeal was allowed by a Justice of the Supreme Court of the United States on the Thirteenth day of May, A. D. 1914.

Wherefore the said appellants pray that a cross appeal be allowed them in the above entitled cause and that an order be entered directing the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit to send the record and proceedings in said cause, with all things concerning the same, as specified in the Rules and General Orders in Bankruptcy promulgated by the Supreme Court of the United States, to the Supreme Court of the United States in order that the errors complained of in the assignments of error, herewith filed by the said appellant, may be reviewed and if error be found, corrected according to the laws and customs of the United States.

RUDOLPH MATZ,
WILLIAM D. BANGS,
Counsel for Appellant.

Endorsed: Filed May 18, 1914. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the eighteenth day of May, 1914, in the October Term last aforesaid the following further proceedings were had and entered of record, to-wit:

MONDAY, May 18, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

2020.

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes the appellant in the above entitled cause by its counsel, Mr. William D. Bangs, and presents an Assignment of Errors and a Petition for Cross Appeal to the Supreme Court of the United States, and on Consideration Whereof, It is now here ordered that the said Cross Appeal be, and is hereby allowed; the said appellant to file a bond in the sum of five hundred dollars ($500.00).

And afterwards, to-wit: On the third day of June, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Bond, which is in the words and figures following, to-wit:

Know all men by these presents, That we, Chicago Auditorium Association, a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto Central Trust Company of Illinois, a corporation, Trustee in Bankruptcy of the Estate of Frank E. Scott Transfer Company, Bankrupt, in the full sum of Five Hundred Dollars, to be paid to the said Central Trust Company of Illinois, a corporation, Trustee in Bankruptcy of the Estate of Frank E. Scott Transfer Company, its successors, attorneys or assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severaly, firmly by these presents.

Sealed with our seals and dated this 28th day of May, in the year of our Lord, one thousand nine hundred and fourteen.

Whereas, the said Chicago Auditorium Association, appellant in a cause pending in the United States Circuit Court of Appeals for the Seventh Circuit, bearing the number 2020 and entitled In re Frank E. Scott Transfer Company, Bankrupt; Chicago Auditorium Association, Appellant, vs. Central Trust Company of Illinois, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt, Appellee, has prosecuted a cross appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in said Circuit Court of Appeals for the Seventh Circuit on the 20th day of April, A. D. 1914;

Now, therefore, the condition of this obligation is such that if the said Chicago Auditorium Association, a corporation, shall prosecute said cross appeal to effect and shall answer all damages and costs that may be awarded against it, if it fails to make said appeal good,

then this obligation shall be void, otherwise to remain in full force and virtue.

CHICAGO AUDITORIUM ASSOCIATION,
By R. FLOYD CLINCH, *President.* [SEAL.]
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By FRANK J. GAULTER,
Attorney-in-Fact. [SEAL.]

Attest:
[SEAL.] A. W. SAWYER, *Secretary.*

Approved:
JULIAN MACK,
Judge of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed: Filed June 3, 1914. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the fifth day of June, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Præcipe for Transcript, which is in the words and figures following, to-wit:—

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1913, April Session, 1914.

No. 2020.

In re FRANK M. SCOTT TRANSFER COMPANY, Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION, Appellant,
vs.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt.

To the clerk of said court:

Please make a transcript of record in the above entitled matter, containing the following documents, records and proceedings, and no others.

(1) Assignment of errors of Chicago Auditorium Association.
(2) Petition by Chicago Auditorium Association for a cross-appeal to the Supreme Court of the United States.
(3) Order allowing said cross-appeal.
(4) Bond of Chicago Auditorium Association on cross appeal.

Yours respectfully,

RUDOLPH MATZ,
WILLIAM D. BANGS,
Counsel for Appellant.

June 4th 1914.

Endorsed: Filed June 5, 1914. Edward M. Holloway, Clerk.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 8, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the Præcipe filed herein on June 5, 1914, in the case of In the Matter of Frank E. Scott Transfer Company, Bankrupt, Chicago Auditorium Association vs. Central Trust Company of Illinois, Trustee, etc. No. 2020, October Term, 1913, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighth day of June A. D. 1914.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

Endorsed on cover: File No. 24,239. U. S. Circuit Court Appeals, 7th Circuit. Term No. 500. Central Trust Company of Illinois, trustee of the estate of Frank E. Scott Transfer Company, bankrupt, appellant, vs. Chicago Auditorium Association. Filed May 25, 1914. File No. 24,265. Term No. 521. Chicago Auditorium Association, appellant, vs. Central Trust Company of Illinois, trustee of the estate of Frank E. Scott Transfer Company, bankrupt. Filed June 10th, 1914. File Nos. 24,239 and 24,265.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1914.

No. 162

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Appellant,

vs.

CHICAGO AUDITORIUM ASSOCIATION,
Appellee.

No. 174

CHICAGO AUDITORIUM ASSOCIATION,
Appellant,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Appellee.

Appeal and cross-appeal, from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT ON BEHALF OF CENTRAL TRUST COMPANY OF ILLINOIS, ETC., APPELLANT.

EDWIN C. BRANDENBURG,
FREDERICK D. SILBER,
CLARENCE J. SILBER,
Counsel for Appellant.

Geo. Hornstein Co., Printer, Chicago.

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INDEX OF AUTHORITIES CITED.

STATUTES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 500.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Appellant,

vs.

CHICAGO AUDITORIUM ASSOCIATION,
Appellee.

No. 521.

CHICAGO AUDITORIUM ASSOCIATION,
Appellant,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Appellee.

Appeal and cross-appeal, from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT ON BEHALF OF CENTRAL TRUST COMPANY OF ILLINOIS, ETC., APPELLANT.

STATEMENT OF THE CASE.

This is an appeal, from a judgment of the United States Circuit Court of Appeals, for the Seventh Circuit, by which the claim of the Chicago Auditorium Association (referred to herein as the Association), was allowed for the sum of $691.86.

On July 22, 1911, a creditors' petition in bankruptcy was filed against the Scott Transfer Company, an Illinois corporation, whereon a decree of adjudication was entered August 7, 1911. The act of bankruptcy charged and adjudicated does not appear in the record. When bankruptcy proceedings were commenced, the bankrupt was a party to a contract then partially performed, with the Association, entered into on February 1, 1911.

By the terms of the contract, the Association granted to the bankrupt, for the term of five years, the exclusive privilege of transferring and carrying to and from the Chicago Auditorium Hotel, all articles of baggage, and all persons and passengers, and of furnishing livery to the guests and patrons of the hotel, so far as it was within the legal capacity of the Association to grant the same. For the baggage privilege, the bankrupt agreed to pay to the Association, the sum of $6,000 in monthly installments of $100 each, and for the livery privilege, the sum of $15,000, in monthly installments of $250 each, on the first of every month, during the contract period. (Trans., 31-32.)

By further provisions of the contract it was agreed that:

> "The party of the first part (Chicago Auditorium Association), however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either

or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so cancelled and revoked.

"Said rights and concessions shall not be assignable without the express written consent of the party of the first part, nor shall the assignment of the same, with such written consent, relieve the party of the second part (Scott Transfer Company), from liability on the covenants and agreements of this instrument."

The contract further authorized the Association, in the event of default made by the bankrupt, either in the payment of any installment of money due or in the performance of any other covenant, if continued for thirty days, to terminate at its option, the privileges and concessions granted, in which event the bankrupt was to continue liable upon its covenants. Authority was also conferred upon the Association, should the foregoing option be exercised, before the termination of the contract by its terms, to sell the concessions and privileges granted to the bankrupt, or, to make a new or different contract for the remainder of the term. But the liability of the bankrupt, unless released in writing, was preserved for the entire amount which the contract obligated it to pay.

As found by the Court of Appeals (Trans., 32), the contract remained in force when bankruptcy of the Transfer Company occurred, and its provisions

had not been breached by either party thereto. Appellant, as trustee, did not elect to assume its performance, and on February 28, 1912, appellee made proof of its claim against the bankrupt estate.

Attached to the proof, appears a copy of the contract relied on, together with an itemized statement of appellee's claim. This shows the sum of $311.20, due under the contract for the months of May, June and July, 1911. (Trans., 6.) The petition in bankruptcy was filed July 22, 1911. The remainder of the claim, counts upon damages for breach of contract, of which $691.86 represents loss incurred from August 1, 1911, to February 1, 1912, being the difference between the several amounts to be paid during this period by the bankrupt, and the amount realized through a new contract made by the Association with third parties. This amount for which the Court of Appeals directed allowance, accrued during the six months' period following August 1, 1911, after the commencement of proceedings in bankruptcy against the Transfer Company.

The last item of the claim, appearing in the proof filed (Trans., 7), seeks damages (computed by the claimant) for the balance of the contract period, from February 1, 1912, to January 31, 1916.

Appellant, trustee, filed its objections to the foregoing claim of the Association, with the Referee having in charge the administration of the bankrupt's estate (Trans., 8), which objections without taking testimony, the Referee sustained, except as to that portion of the claim which had accrued prior to the bankruptcy proceedings.

On review, the District Court (Landis, Judge), sustained the Referee's order (Trans., 13), and on further appeal, to the Circuit Court of Appeals, the order of the District Court was reversed, and the cause remanded, with instructions to the District Court to allow $691.86, of appellee's claim, as damages and to disallow the remaining portion of the claim. (Trans., 32.)

That part of the claim, directed for allowance by the Court of Appeals, represented damages sustained during the six months period immediately following the institution of bankruptcy proceedings against the Transfer Company. Its allowance was measured as to time, by the option clause in the contract, whereby the right to terminate was reserved to the Association, on six months' notice in writing to the bankrupt. The appellee having by its proof of debt, as stated, set forth its damages claimed for the six months' period, this was accepted as conclusive by the appellant, for the purposes of this appeal.

On May 13, 1914, on petition of appellant, addressed to this Court, an appeal was allowed pursuant to Section 25b(2), of the Bankrupt Act. (Trans., 37.) Thereafter, on application by appellee, to the Circuit Court of Appeals, a cross-appeal was allowed on May 18, 1914, and perfected. (Trans., 40.)

A motion was submitted to this Court, May 17, 1915, by appellant, to dismiss the cross-appeal allowed to appellee, on the ground that the court was without jurisdiction to entertain such cross-appeal. Concurrently with this motion, appellee presented

its petition for a writ of certiorari, for the purpose of assigning cross-error. Both motion and petition were on June 1, 1915, reserved by this Court for decison pending the hearing of the appeal upon its merits.

ERRORS RELIED ON BY APPELLANT.

1. That the said United States Circuit Court of Appeals for the Seventh Circuit, erred in admitting to proof any part of the claim presented by Chicago Auditorium Association, excepting such portion as had accrued prior to the commencement of bankruptcy proceedings, being the sum of $311.20.

2. In holding that bankruptcy operates as an anticipatory breach of the contract, from which the claim of Chicago Auditorium Association arose, and that such resulting claim for damages is provable against the bankrupt's estate.

3. In not disallowing the entire claim of Chicago Auditorium Association for damages accruing out of the alleged breach of its contract.

4. In directing the District Court to allow the claim of the Chicago Auditorium Association, for the sum of $691.86, or any part thereof.

5. In reversing the order of the United States District Court, for the Eastern Division of the Northern District of Illinois, and in not affirming said order.

BRIEF.

Points and Authorities.

I.

SUBDIVISIONS 1 AND 4, OF SECTION 63A, OF THE BANKRUPT ACT, MUST BE CONSTRUED TOGETHER, AND THE WORDS, "ABSOLUTELY OWING AT THE TIME OF THE FILING OF THE PETITION, ETC.," APPEARING IN SUBDIVISION 1, ARE TO BE READ INTO AND CONSTRUED AS A PART OF SUBDIVISION 4.

Zavelo v. *Reeves*, 227 U. S., 625; 29 Am. B. R., 493.

In Re Roth & Appel (C. C. A. 2nd Cir.), 181 Fed. Rep., 667; 24 Am. B. R., 588.

Colman Co. v. *Withoft* (C. C. A. 9th Cir.), 195 Fed. Rep., 250; 28 Am. B. R., 328.

II.

ANTICIPATORY BREACH OF AN EXECUTORY CONTRACT, RESULTS FROM A POSITIVE, UNCONDITIONAL AND UNEQUIVOCAL DECLARATION BY A PARTY THERETO, OF FIXED PURPOSE NOT TO PERFORM THE CONTRACT, IN ANY EVENT OR AT ANY TIME.

Dingley v. *Oler*, 117 U. S., 490.

Roehm v. *Horst*, 178 U. S., 1.

Lake Shore & Michigan Southern Ry. Co. v. *Richards*, 152 Ill., 59.

Zuck v. *McClure*, 98 Pa. St. Rep., 541.

Johnstone v. *Milling*, L. R. 16, Q. B. Div., 460.

Dalrymple v. *Scott*, 19 Ont. App. Rep., 477.

People v. *Globe Mutual Life Ins Co.*, 91 N. Y., 174.

Distinguishing:

Lovell v. *St. Louis Life Ins. Co.*, 111 U. S., 264.

Carr v. *Hamilton*, 129 U. S., 252.

Penna. Steel Co. v. *New York City Ry. Co.*, 198 Fed. Rep., 721, 735.

A.

ACCORDINGLY, IT IS HELD, THAT NEITHER INSOLVENCY NOR THE FILING OF AN INVOLUNTARY PETITION IN BANKRUPTCY, FOLLOWED BY ADJUDICATION, CONSTITUTES A BREACH OF AN EXECUTORY CONTRACT, TO WHICH THE INSOLVENT OR BANKRUPT IS A PARTY, AND FROM WHICH A PROVABLE DEBT ACCRUES.

Phenix Nat. Park Bank v. *Waterbury*, 197 N. Y., 161; 23 Am. B. R., 250.

In Re Agra Bank, L. R., 5, Equity Cases, 160.

Malcomson v. *Wappoo Mills* (C. C. S. C.), 88 Fed. Rep., 680.

In Re Inman & Co. (D. C. Ga.), 171 Fed. Rep., 185; 22 Am. B. R., 524.

In Re Inman & Co. (D. C. Ga.), 175 Fed. Rep., 312; 23 Am. B. R., 566.

Lesser v. *Gray*, 8 Ga. App., 605.

Affirmed in 236 U. S., 70; 34 Am. B. R., 8.

In Re Imperial Brewing Company (D. C. Mo.), 143 Fed. Rep., 579; 16 Am. B. R., 110.

Matter of Montague & Gillet Inc. (D. C. Southern Dist. N. Y.), 32 Am. B. R., 106.

Distinguishing:

In Re Swift, 112 Fed. Rep., 315; 7 Am. B. R., 374.

In Re Pettingill & Co., 137 Fed. Rep., 143; 14 Am. B. R., 728.

In Re Neff, 157 Fed. Rep., 57; 19 Am. B. R., 23.

B.

RESULTING CLAIM FOR DAMAGES, IF BANKRUPTCY IS IN FACT A BREACH, CONSTITUTES NOTHING MORE THAN A CONTINGENT CLAIM, WHICH IS NON-PROVABLE UNDER THE PRESENT BANKRUPTCY ACT, SEC. 63A.

Remington on Bankruptcy (2nd Ed. Vol. 1, Sec. 641).

Dunbar v. *Dunbar,* 190 U. S., 340; 10 Am. B. R., 139.

Cotting v. *Hooper, Lewis & Co.* (Mass. Sup. Ct.), 34 Am. B. R., 23.

In Re Levy & Sons Co. (D. C. Md.), 208 Fed. Rep., 479; 31 Am. B. R., 25.

In Re American Vacuum Cleaner Co. (D. C. N. J.), 192 Fed. Rep., 939; 26 Am. B. R., 621.

Williams et al. v. *U S. Fidelity & Guaranty Co.,* 236 U. S., 549; 34 Am. B. R., 181.

III.

FOR THE SAME REASON, AS APPLIED TO LEASEHOLD CONTRACTS, SUBSEQUENT INSTALLMENTS OF RENT OR DAMAGES FOR ALLEGED BREACH THROUGH BANKRUPTCY, OF ONE OF THE PARTIES, ARE NOT PROVABLE IN BANKRUPTCY.

Watson v. *Merrill* (C. C. A. 8th Cir.), 136 Fed. Rep., 359; 14 Am. B. R., 453.

Colman Co. v. *Withoft* (C. C. A. 9th Cir.), 195 Fed Rep., 250; 28 Am. B. R., 328.

In Re Roth & Appel (C. C. A. 2nd Cir.), 181 Fed. Rep., 667; 24 Am. B. R., 588.

Slocum v. *Soliday* (C. C. A. 1st Cir.), 183 Fed. Rep., 410; 25 Am. B. R., 460.

IV.

THE CONTRACT INVOLVED, PASSED BY OPERATION OF LAW, AS PART OF THE BANKRUPT'S ESTATE, TO THE APPELLANT AS ITS TRUSTEE.

Gazlay et al. v. *Williams, Trustee*, 210 U. S., 41; 20 Am. B. R., 18.

A.

AND AS SUCH, THE APPELLANT HAD A REASONABLE LENGTH OF TIME AFTER ITS ELECTION AND QUALIFICATION AS TRUSTEE, TO EITHER ASSUME OR RENOUNCE PERFORMANCE OF THE CONTRACT.

Sparhawk v. *Yerkes*, 142 U. S., 1, 13.

Sessions v. *Romadka*, 145 U. S., 29.

Atchison, Topeka & Santa Fe Ry. Co. v. *Hurley* (C. C. A. 8th Cir.), 153 Fed. Rep., 503; 18 Am. B. R., 396, 404.

ARGUMENT.

Before proceeding with the argument of this appeal, on its merits, we again desire to urge our motion, heretofore submitted, to dismiss the pending cross-appeal allowed to appellee, and likewise to oppose the issuance, on appellee's application, of a writ of *certiorari*. Without repeating what we have set forth in the brief filed by us, in support of the motion to dismiss, it will be apparent that the Circuit Court of Appeals properly interpreted the option clause in the contract now under consideration, when it said (Trans., 29):

> "Under this provision the contract is mutually obligatory for a term of six months only, and uncertain and without force for any longer term of service *in futuro*, within *Dunbar* v. *Dunbar*, (*supra*), and authorities cited. Thus no damages for breach are provable beyond such period."

In this ruling, the Court of Appeals applied a principle of general law, uninfluenced by any provision of the Bankrupt Act. Had the question arisen in an action to recover damages for breach of contract, there would be no justification for the allowance of a cross-appeal, as no Federal question is involved, and no greater right should be accorded in bankruptcy. By what we have said, we are not to be understood as conceding that appellee's claim for damages is provable, in any view or for any amount, against the bankrupt estate. This we shall presently demonstrate, by the authorities cited.

The result reached by the Court of Appeals in its ultimate decision of the case, is found in the first conclusion of law, stated by the Court as follows (Trans., 32):

> "That the intervention of bankruptcy, as recited, constituted anticipatory breach of the contract in suit for which damages are provable in bankruptcy."

But disregarding this phase of the controversy, for the moment, it is our position that the Court of Appeals was right in its construction of the option provision of the contract, the language of which is, that (Trans., 5):

> "The party of the first part, (Chicago Auditorium Association), however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, (livery and baggage), by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so cancelled and revoked."

The right thus reserved to appellee, to terminate the contract in accordance with the foregoing option, made its continuance so indefinite, and uncertain, as to limit recovery to the six months' period, in the view taken by the Court of Appeals, because

the contract was mutually obligatory for this period only. But whether right or wrong in its conclusion, this question is not now open for review, and this court is without jurisdiction to entertain the cross-appeal for the reasons set forth in *Chapman, Trustee, etc.*, v. *Bowen*, 207 U. S., 89, 92, wherein Chief Justice Fuller, after referring to Section 25b of the Bankrupt Act, governing appeals in bankruptcy, says:

> "As to paragraph 2, there was no such certificate here; and as to paragraph 1, we are not able to perceive that a writ of error from the highest court of a State to this court could be maintained. No validity of a treaty or statute of, or an authority exercised under, the United States was drawn in question; nor the validity of a statute of, or an authority exercised under, any State, on the ground of repugnancy to the Constitution, treaties or laws of the United States; nor was any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and decided against. The decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the Bankruptcy Act."

Again, the ruling of the Court of Appeals, upon which cross-error is asigned by appellee, does not present a question of such grave importance, as to justify the issuance of the writ of *certiorari*. Appellant's purpose in prosecuting its appeal, is to obtain an authoritative adjudication of an issue whereon great diversity appears in the decisions of the Federal Courts, and thereby to settle a question constantly recurring in the course of adminis-

tration in bankruptcy. While we believe that this Court will rule against provability of appellee's claim for damages, and thereby eliminate any necessity for consideration of the point which appellee seeks to have reviewed, we still maintain that neither cross-appeal nor *certiorari* should be allowed.

I.

SUBDIVISIONS 1 AND 4, OF SECTION 63a, OF THE BANKRUPT ACT, MUST BE CONSTRUED TOGETHER, AND THE WORDS, "ABSOLUTELY OWING AT THE TIME OF THE FILING OF THE PETITION," ETC., APPEARING IN SUBDIVISION 1, ARE TO BE READ INTO AND CONSTRUED AS A PART OF SUBDIVISION 4.

For definition of claims provable against the estate of a bankrupt, under the existing Act, Section 63, insofar as it affects appellee's claim, is as follows:

> "a—Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (4) founded upon an open account, or upon a contract express or implied.
>
> "b—Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

In *Zavelo* v. *Reeves*, 29 Am. B. R., 493, this Court considered the effect of a discharge in bankruptcy,

by composition, upon a promise made by the bankrupt subsequent to his adjudication and before discharge, to pay an indebtedness due defendant in error. In this connection Section 63 (above quoted), was construed as follows (pages 497, 498):

> "For the definition of 'provable debts' we are referred to Section 63, which is set forth in full in the margin. Of the several classes of liabilities, those in clauses 1, 2 and 3 are in terms described as existing at or before the filing of the petition. Clause 5 relates to liabilities 'founded upon provable debts reduced to judgment after the filing of the petition,' etc.; plainly meaning that they arose before its filing. Clause 4 describes simply debts that are 'founded upon an open account, or upon a contract, express or implied,' not in terms referring to the time of the inception of the indebtedness. But, reading the whole of Section 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under Section 63a, Cl. 4, include only such as existed at the time of the filing of the petition in bankruptcy. * * *
>
> "The view above expressed as to clause 4 of Section 63a is the same that has been generally adopted in the Federal District Courts. *Re Burka* (D. C. Mo.), 5 Am. B. R., 12; 104 Fed., 326; *Re Swift* (C. C. A. 1st Cir.), 7 Am. B. R., 374, 112 Fed., 315, 321, 50 C. C. A., 264; *Re Adams* (D. C. Mass.), 12 Am. B. R., 368, 30 Fed., 381; *Colman Co.* v. *Withoft* (C. C. A., 9th Cir.), 28 Am. B. R., 328, 195 Fed., 250, 252; and see *Re Roth & Appel* (C. C. A., 2nd Cir.), 24 Am. B. R., 588, 181 Fed., 667, 104 C. C. A., 649, 31 L. R. A. (N. S.), 270."

In re Roth & Appel, 24 Am. B. R., 588 (to be referred to in another connection), the Court of Appeals for the Second Circuit dealing with the same section, says (page 597):

> "But while it is not necessary in order to reach a decision in this case to determine whether 63a (4) is subject to the limitation contained in 63a (1), that debts to be provable must be absolutely owing at the time of filing the petition, we think it the better view that it is so limited. If it is not so limited the limitations in the first subdivision are practically of no effect. All claims upon instruments in writing not provable under the first clause, because not absolutely owing at the time of the petition, might be proved as claims founded upon a 'contract express or implied' under the fourth clause if no limitations are attached to the latter. We cannot regard this interpretation as tenable. We think that the different clauses of 63a should not be considered as independent, but should be read together, and that the said limitation in the first clause should be considered as repeated in the fourth clause. This interpretation of the section is supported by authority. Thus, *In re Swift* (C. C. A. 1st Cir.), 7 Am. B. R., 374, 112 Fed., 316, already referred to, the Circuit Court of Appeals for the First Circuit said:
>
> " 'That part of the present Bankruptcy Act which describes what debts may be proved does not repeat at all points the words 'owing at the time of the filing of the petition,' but it is impossible to consider it other than as though it did thus repeat them.' "

In *Colman Co.* v. *Withoft*, 28 Am. B. R., 328, the Circuit Court of Appeals for the Ninth Circuit ruled that (page 330):

> "It is held by the decided weight of authority that subdivisions 1 and 4 of section 63a of the Bankruptcy Act are in *pari materia*, and that the words 'absolutely owing at the time of the filing of the petition against him' are to be read into subdivision 4."

These decisions definitely settle the point that resort must be had exclusively to subdivision 4, as thus interpreted, for provability of appellee's claim, which is not for allowance of a fixed liability, but for damages sustained. (*Phenix Nat'l. Park Bank* v. *Waterbury*, 23 Am. B. R., 250.) And the immediate question for the determination of this Court, is whether bankruptcy proceedings initiated by creditors, culminating in a decree of adjudication, in itself and without further proof, produces a simultaneous breach of contract, damages for which are provable against the bankrupt's estate. Before reaching this question however, it is deemed essential to examine the authorities defining anticipatory breach of contract and what declarations, acts or conduct create such breach, or option to terminate the contract.

II.

ANTICIPATORY BREACH OF AN EXECUTORY CONTRACT, RESULTS FROM A POSITIVE, UNCONDITIONAL AND UNEQUIVOCAL DECLARATION BY A PARTY THERETO, OF FIXED PURPOSE NOT TO PERFORM THE CONTRACT, IN ANY EVENT OR AT ANY TIME.

In *Dingley* v. *Oler*, 117 U. S., 490, the Court, while not applying the doctrine of anticipatory breach, took the view that the facts there presented did not bring the case within the principle contended for.

This was an action of assumpsit, to recover damages for the alleged breach of an agreement, whereby the defendants undertook, in consideration of the delivery to them by the plaintiffs, of a quantity of ice, to return the same amount from their ice houses in the year following (1880). In response to the plaintiffs' request for delivery, in July, the defendants declined to make the shipment, claiming a right to pay for the ice in cash, at the price that plaintiffs had offered to sell to other parties in that particular market. The defendants' letter counted upon to establish the breach, contained this language:

> "We can not, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein and in ours of the 7th."

The court says (pages 502, 503):

> "This, we think, is very far from being a positive, unconditional and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. * * *
>
> "The view taken by the circuit court of the correspondence and conduct of the parties, and which we hold to be erroneous, brought the case within the rule laid down by the English courts in *Hochster* v. *De La Tour*, 2 Ell. & Bl. 678; *Frost* v. *Knight*, L. R. 7 Ex. 111; *Danube, etc. R. Co.* v. *Xenos*, 11 C. B. N. S. 152, and which, in *Roper* v. *Johnson*, L. R. 8 C. P. 167, 178, was called a novel doctrine, followed by the courts of several of the States, *Crabtree* v. *Messersmith*, 19 Iowa, 179; *Holloway* v. *Griffith*, 32 Iowa, 409; *Fox* v. *Kittin*, 19 Ill. 519; *Chamber of Commerce* v. *Sollitt*, 43 Ill. 519; *Dugan* v. *Ander-*

son, 36 Md. 567; *Burtis* v. *Thompson*, 42 N. Y. 246, but disputed and denied by the Supreme Judicial Court of Massachusetts in *Daniels* v. *Newton*, 114 Mass. 530, and never applied in this court. Accordingly, the right to maintain the present action was justified upon the principle supposed to be established by those cases.

"The construction we place upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs; for, upon that construction, this case does not come within the operation of the rule invoked.

"In *Smoot's Case*, 15 Wall. 36 (82 U. S. Bk. 21, L. ed. 107), this court quoted with approval the qualification stated by Benjamin on Sales, 424, that 'A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end.'"

In *Roehm* v. *Horst*, 178 U. S., 1, the doctrine of anticipatory breach was first directly passed upon by this Court, and applied to enforce the liability of the defendant on his contracts to purchase a balance of four hundred bales of hops, for delivery by the plaintiffs at the rate of twenty bales a month, from October, 1896, to July, 1898. Previously, six hundred bales had been delivered to the defendant in accordance with the terms of six separate contracts, and accepted by him. By reason of the dis-

solution of the plaintiff firm, and notification to this effect in June, 1896, the defendant in a letter addressed to the plaintiffs, said: "I therefore consider the contracts annulled and will make other arrangements for the purchase of the hops I may need, and you may consider this as release from liability on your part to comply with the contracts." In October, 1896, the first installment went forward to defendant, under the contracts involved for decision, which installment the defendant refused to accept, standing upon the repudiation contained in his letter. Thereafter, no further deliveries were attempted by the plaintiffs, and in January, 1897, this action was commenced, wherein judgment passed for the plaintiff. The opinion of this Court fully reviews the English and American cases, dealing with breach of an executory contract by anticipation, and it is ruled that no distinction is to be draw between renunciation before performance is due, and in the course of performance. Upon this, the Court, by Chief Justice Fuller, says (page 19):

> "We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept

this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus poenitentiae* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?"

In this case, cited and relied on by appellee, and referred to by the Court of Appeals, in its opinion, there was a positive refusal by Horst to proceed with the performance of his contractual obligation. It was *his voluntary act*, declaring an intention to be no longer bound by his contract. This, as the Court concluded, amounted, at the election of the plaintiffs, to a breach by anticipation.

The effect of the ruling by the Court of Appeals, is to extend the application of this doctrine, by holding that involuntary proceedings in bankruptcy, against a party to an executory contract, in the course of performance, followed by adjudication, is the equivalent of his voluntary act in renouncing further performance. And this, without regard to the contributing causes which bring about the involuntary bankruptcy. This, we submit, is unsound, tested by the elementary principles governing anticipatory breach.

In *Lake Shore & Michigan Southern Ry. Co.* v. *Richards*, 152 Ill., 59, the Supreme Court of Illinois states the rule as follows (pages 89, 90):

"Without further quotation from cases, it

> seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his acts and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party, and it can make no difference whether the contract has been partially performed or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that that determination has been reached and is being acted upon. It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not, of themselves, amount to a breach, so as to create an effectual renunciation of the contract, for one party can not, by any act or declaration, destroy the binding force and efficacy of the contract."

In *Zuck* v. *McClure*, 98 Pa. St. Rep., 541, suit was commenced November 29, 1879, to recover the purchase price of coke, against which the defendants claimed damages as by set-off, for failure of the plaintiffs to deliver coke pursuant to an agreement to make deliveries from December 1, 1879, to May 31, 1880. This agreement the plaintiffs refused to comply with, and repudiated in November, 1879. As late as December 4th, thereafter, the defendants urged the plaintiffs to make delivery. It was contended that as the claim had not matured when the main action was begun, no right of set-off existed. In reversing judgment, for the defendant, the court, by Justice Paxson, said (page 545):

> "The notice of an intention not to perform the contract, if not accepted by the other party as a present breach, remains only a matter of intention, and may be withdrawn at any time before the performance is in fact due; but if not in fact withdrawn it is evidence of a continued intention to refuse performance down to and inclusive of the time appointed for performance. *Ripley* v. *McClure*, 4 Ex. 345; Leake on the Law of Contracts, 873. The promisee may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance."

In *Johnstone* v. *Milling*, L. R. 16, Q. B. Div., 460, the defendant sought to counterclaim for damages for breach of a covenant in a lease, whereby the plaintiff landlord on six months' notice in writing, after the expiration of the first four years of the term, was to rebuild the premises. The right to terminate the lease was reserved to the defendant, at the end of the fourth, seventh or fourteenth year of the lease. This right was exercised by the defendant tenant, who claimed that during the latter part of the four years of his tenancy, the plaintiff, on request, had frequently averred his inability to raise the moneys necessary to rebuild. The doctrine of *Hochster* v. *De la Tour* was invoked, in support of the counterclaim. On appeal to the Queen's Bench Division, from judgment in favor of the plaintiff, Lord Esher, M. R., says (page 467):

> "When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind

the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract can not by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too, treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He can not, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end, except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue. Such appears to me to be the only doctrine recognized by the law with regard to anticipatory breach of contract."

Bowen, L. J., stated the rule as follows (pages 472-473):

"We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor, not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for the breach thereof. It would seem on principle, that the declaration of such intention by the promisor is not in itself and unless acted on

by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it, into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such."

The foregoing decisions establish that there is no distinction in the principles applicable to anticipatory breach of contract, when such breach occurs either before performance is due, or in the course of performance; that such breach results from the voluntary act of one of the parties, by a positive and unequivocal renunciation, either by word or conduct, of his obligation to perform the contract; that such declared intention does not of itself amount to a breach, but that it thereupon becomes optional with the other party to so treat it; that an election to this end becomes necessary on the part of the promisee; that upon election to treat the renunciation as a breach, an immediate right of action accrues; but if the party not in default elects to treat the contract as in force, it remains effective for the benefit of both.

In the opinion of the Court of Appeals (216 Fed.

Rep., 308; 32 Am. B. R., 417), this language appears (page 310):

> "The general doctrine of anticipatory breach of an executory contract whenever the contractor disenables himself from performance is well established (*Lovell v. St. Louis Life Ins. Co.*, 111 U. S. 264, 274; 4 Sup. Ct. 390, 28 L. Ed., 423; *Roehm v. Horst*, 178 U. S., 1, 7, 20 Sup. Ct. 780, 44 L. Ed., 953, and cases reviewed) and its application, when the contractor 'becomes bankrupt and goes into liquidation,' is upheld in *Carr v. Hamilton*, 129 U. S. 252, 256, 9 Sup. Ct. 295, 32 L. Ed. 669, in reference to a policy of life insurance, for the reason that the company thereby 'becomes *civiliter mortuus*; its business is brought to an absolute end.' It has likewise been pronounced applicable to an executory contract 'broken by the insolvency of the railway companies and the appointment of receivers' thereof, whenever the receivers reject the contract, and that in such event the 'rejection relates back to the beginning of the receivership.' *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 721, 736, 744; 117 C. C. A. 503, 2d Circuit."

The cases referred to by the court emphasize why it is that the doctrine of anticipatory breach can not be applied to the facts at bar, and more particularly establish, on principle, that involuntary proceedings in bankruptcy, with adjudication thereon against one of the contracting parties, can not alone amount to a breach of contract.

In the *Lovell* case, cited, a bill was filed by the insured against the St. Louis Mutual Life Insurance Company, and the St. Louis Life Insurance Company, for relief touching a certain policy issued by the former company, to Lovell, on his life, for the

benefit of his wife, and payable to her on his death. The insured, by arrangement entered into with an agent of the insurance company, sought to surrender his policy, and obtain therefor, a paid up policy for a stated amount. Before the substitution was completed, the insurance superintendent of the state of Missouri, proceeded against the St. Louis Mutual Life Insurance Company, because of its insolvency, and obtained an injunction against it from further transacting its business. Subsequently, pursuant to court authority, the company transferred all of its assets to the Mound City Life Insurance Company, which latter re-insured the risks outstanding. Thereafter, the name of the Mound City Life Insurance Company was changed to the St. Louis Life Insurance Company. The complainant did not consent to have his contract taken over. The Court says (page 272):

> "Since the latter Company (St. Louis Mutual Life Insurance Company) totally abandoned the performance of the contract made with the complainant, and transferred all its assets and business to another company, and since the contract is executory and continuous in its nature, the complainant had a right to consider the contract as at an end, and to demand what was justly due to him by reason of its abandonment by the Company."

In *Carr* v. *Hamilton* (*supra*), proceedings were instituted by the Superintendent of Insurance, for the State of Missouri, against the Life Association of America, for the liquidation of its affairs, as a result of which a decree was entered declaring the association insolvent, enjoining its offi-

cers and agents from exercising further control over its property and assets, and of dissolution. The insurance superintendent was directed to liquidate the assets for the benefit of creditors and policy holders. In furtherance of the liquidation, he filed a bill to foreclose a certain mortgage given to the Association by Hamilton, to secure repayment of a loan made by the latter. By cross-bill, Hamilton sought to set off the amount due him on a policy issued by the Association, which was not then due, but which possessed a certain cash value. It was contended on behalf of the complainant, that this was not a proper subject of set-off for the reason that the insurance had not become absolute in Hamilton, and would not become so for several years thereafter. In ruling against this contention, and in affirming the decree of the lower court, whereby foreclosure of the Hamilton mortgage was restrained, this Court says (page 256):

> "It is difficult to see why this principle of justice (referring to set-offs under bankruptcy statutes) should not apply to persons holding policies of life insurance in a company which becomes bankrupt and goes into liquidation. By that act the company becomes *civiliter mortuus*, its business is brought to an absolute end, and the policy holders become creditors to an amount equal to the equitable value of their respective policies, and entitled to participate *pro rata* in its assets."

We call the Court's attention to the fact that in the case cited, a decree of dissolution was entered, which might be considered as sufficient reason for the accrual of a cause of action on the claim of the

insured, against the insurance company. But adjudication in bankruptcy of a corporation does not operate as a legal dissolution or cause a forfeiture of its charter.

Nat'l. Surety Co. v. *Medlock*, 2 Ga. App., 665; 19 Am. B. R., 654.

In *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. Rep., 735, 746, the Circuit Court of Appeals, for the Second Circuit, promulgated a rule for the allowance of claims in the receivership proceedings instituted against the New York City Railway Company, and the Metropolitan Street Railway Company. It appeared that both of these defendants *consented* to the appointment of receivers, and the immediate question considered by the court, on this branch of the appeal, was whether a claim for damages should be allowed in favor of the Metropolitan Express Company, for renunciation by the receivers of further performance of a contract whereby the Railway company granted to the Express company, the right for a period of twenty years, not then expired, to move express matter over its railway system. In sustaining the claim for damages, the court adopted a rule which, as the opinion states, was consonant with the rights and equities of creditors. Thereby claims became entitled to allowance, if certain, or capable of being made certain, by recognized methods of computation, when presented within the time limited by the court for their presentation. After reviewing the bankruptcy decisions, relative to claims susceptible of proof and allowance, the court uses this language (page 743):

> "It is possible that the appointment of a receiver of an objecting corporation, although preventing it from carrying out its executory contracts, might be considered to be the act of the law and not such an act of the party as would constitute an anticipatory breach of such contracts within the rule. It is probable, too, that bankruptcy and insolvency do not break contracts when they do not in fact prevent performance. Thus the bankruptcy of a lessee does not terminate the lease and the lessee may be holden upon the rent covenant if he be permitted to continue his occupation. But when bankruptcy and insolvency do put it out of the power of the bankrupt or insolvent to perform his executory contracts, and when he does participate in bringing on the proceedings, they constitute the breach of such contract."

Tested by the authorities referred to, the filing of an involuntary petition in bankruptcy, with adjudication thereon, against one of the parties to an executory contract in the course of performance, can not as a matter of law and without any showing as to the default of the bankrupt promisor, amount to an anticipatory breach. If inability to perform on the part of the bankrupt follows, it is not his voluntary act, which directly brings this condition about, but is the act of the law resulting from an adverse proceeding instituted by his creditors, over which he may have no control, and for which he may be in no wise responsible.

As said in *People* v. *Globe Mutual Life Insurance Co.*, 91 N. Y., 174 (pages 178, 179):

> "There was no breach of the contract between Mix and the insurance company by either of

> the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service the company had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears it would have done so if let alone."

The case at bar is to be distinguished from those decisions, notably *Grant Shoe Co.* v. *Laird Co.*, 212 U. S., 445; 21 Am. B. R., 484; and *In Re Stern*, 116 Fed. Rep., 604; 8 Am. B. R., 569, wherein when bankruptcy intervened, the court found contracts already broken and a liability for breach then existing, and dealt with what it found, holding in each instance, the resulting claim for damages provable.

A.

NEITHER INSOLVENCY NOR THE FILING OF AN INVOLUNTARY PETITION IN BANKRUPTCY FOLLOWED BY ADJUDICATION, CONSTITUTES A BREACH OF AN EXECUTORY CONTRACT TO WHICH THE INSOLVENT OR BANKRUPT IS A PARTY, AND FROM WHICH A PROVABLE DEBT ACCRUES.

In *Phenix Nat. Park Bank* v. *Waterbury*, 23 Am. B. R., 250, plaintiff sought to recover upon an agreement made with the defendants, whereby they obligated themselves to purchase certain stock on the 1st day of May, 1900, or on any earlier date at their option, and to pay therefor the sum of $25,000. On its part, the plaintiff agreed to deliver the stock to

the defendants on the terms named, May 1, 1900, or at such earlier day as the defendants might elect to purchase. The defendants admitted their failure to perform their agreement and proved their adjudication as bankrupts after the making of the contract in suit and their discharge in bankruptcy from all provable debts existing on March 6, 1899. Verdict and judgment passed in favor of the plaintiff, which on appeal was affirmed by the Court of Appeals of New York State. The effect of the judgment was to hold that the plaintiff's claim did not constitute a provable debt against the estate of the defendants in bankruptcy and that their discharge as bankrupts did not relieve them of liability upon their executory contract of purchase. The court says (pages 252-253):

> "Until May 1, 1900, the plaintiff undertook to be ready to sell and deliver such an amount of stock, if called for, and could have no claim against the defendants, prior thereto, or to such a call. The defendants were under no obligation to purchase the stock from the plaintiff before May 1, 1900, unless they chose to do so. When, therefore, as the result of the filing of the petition in bankruptcy, the defendants were adjudicated bankrupts, in 1899, the situation under the contract was that, as yet, no liability had arisen, which, within the very precise definition of the Bankruptcy Act, could be said to be one 'absolutely owing' by them. Ordinarily, the insolvency of a party to an executory contract of sale is not equivalent to a breach. *Pardee* v. *Kanady*, 100 N. Y. 121; *Vandegrift* v. *Cowles Engineering Co.*, 161 N. Y. 435, 444. If, however, the adjudication in bankruptcy could have been treated by the plaintiff as a breach, or renunciation, of the contract, from the impossi-

bility of performance created by the bankrupts before performance was due, then the plaintiff's claim would have been for the damages. But, as that was an optional matter, it was not obliged to present such a claim and could abide its time, and, unless called upon previously by the trustee in bankruptcy, or the defendants, make tender of the stock at the date fixed for its purchase and delivery. I do not think that the bankruptcy of the defendants was, necessarily, to be considered as equivalent to a renunciation by them of the contract, or to a repudiation of their ability to perform."

In Re Agra Bank, L. R., 5, Equity Cases, 160, the facts were these:

One hundred pounds was paid to the Agra and Masterman's Bank, for a letter of credit, in amount not exceeding ten thousand pounds sterling, to be availed of within six months from and after May 25, 1866, in favor of Scurin & Co. Before drafts were drawn against the credit thus established, the bank stopped payment on June 7, 1866, and a winding-up order was afterwards entered. The claim for the charges of one hundred pounds, was admitted to proof, but that for damages was disallowed. The Vice Chancellor thus states the applicable principle (165-166):

"Now the cases which have been cited show that the fact of a firm becoming insolvent, or even bankrupt, is not of itself any breach of a contract of this description. *Howe v. Bowes*, 16 East. 112, indeed, shows that it is not necessary to present the bills in a case where the bank has closed its doors. But there is abundance of authority to show that insolvency or bankruptcy does not constitute a breach of such a

contract as this. In *ex parte Halliday*, 2 D. J. & S. 312, a man, after having entered into a contract for the delivery of goods, before the time for completion arrived, assigned all his goods to trustees for creditors, and the question was, whether a person could prove in respect of a breach of contract under the trust deed. The answer was, that he could not, because it was not at all impossible that the trustees might still choose to perform the contract, and it might be beneficial to the estate that they should do so. That really is the answer here. That the bank has stopped payment is no proof at all that they would not accept the bills. * * *

"The only question is, have the bank refused to complete the contract, or disabled themselves from completing it? It does not appear that they have done either one thing or the other. Therefore I can not allow the claim for damages."

In *Malcomson* v. *Wappoo Mills*, 88 Fed. Rep., 680, the Farmers' Mining Company was, by an order of the United States Circuit Court, for the District of South Carolina, placed in the hands of a receiver, and was enjoined from interfering with any of its property. Mitsui & Co. intervened in the receivership proceedings, alleging breach of a contract with the Mining Company, whereby it agreed on October 14, 1897, to sell to the intervenors, certain river phosphate rock, for shipment in December, 1897, or January, 1898, which was subsequent to the appointment of the receiver. Performance of this contract was made impossible, by the action stated, and damages for the breach were sought by the intervenors. The opinion of Circuit Judge Simonton proceeds in part as follows (page 681):

"The question to be decided is, can damages be recovered against the Farmers' Mining Company for the non-performance of this contract? 'It is a well-settled rule of law that if a party, by his contract, charge himself with an obligation possible to be performed, he must make it good unless its performance be rendered impossible by the act of God, the law, or the other party. Unforseen difficulties will not excuse him.' *Dermott* v. *Jones*, 2 Wall., 1. As has been seen, the Farmers' Mining Company fulfilled, or, rather, was prepared to fulfill, the contract in every particular. The complete fulfillment was prevented by the order of this court in the appointment of the receiver. A delivery of the rock by the company after that was impossible.

* * *

"But when the contract can not be specifically performed, and the only remedy is by way of damages, the court will not inflict such damage on the corporation if the breach of contract for which damages are sought has been occasioned by the law, the performance of the contract having been made impossible. *People* v. *Globe Mutual Life Ins. Co.*, 91 N. Y. 174. In that case a corporation had entered into a contract with a general agent for his services for a specified time and at a stipulated salary. The contract continuing, and the services being rendered, the corporation was placed in the hands of a receiver, who did not continue the agent in his employment. He sued for damages. He could not recover. The company could not employ him, because this would be a violation of the order of injunction. The agent could not meddle in the affairs of the company, for that equally would violate the injunction. It was *damnum absque injuria*."

Decisions by courts of bankruptcy, dealing with claims arising from breach of employment contracts,

uniformly hold, that such claims are not susceptible of proof, although this conclusion is not consistently adhered to in its application to contracts for the purchase and sale of personal property. (*In Re Swift*, 112 Fed. Rep., 315; 7 Am. B. R., 374; *In Re Pettingill & Co.*, 137 Fed. Rep., 143; 14 Am. B. R., 728; *In Re Neff*, 157 Fed. Rep., 57; 19 Am. B. R., 23.)

Referring to these authorities, the Court of Appeals in its opinion, in the case at bar, says (216 Fed. Rep., 308, 311):

> "We are of opinion that these decisions are well founded, both in their definition of the general doctrine referred to and in respect of the instantaneous effect of proceedings in bankruptcy for anticipatory breach of the unperformed contracts, unless the trustee in bankruptcy elects performance thereof in the interest of the estate, and that it is equally applicable whether the proceedings are voluntary or involuntary, notwithstanding the distinction in that particular suggested in one or more of the District Court citations."

Examination of the cases referred to, discloses in each instance, that the obligation resting upon the bankrupt, required not the rendition of services, but the payment of money, upon a consideration previously received, and that had the trustee elected performance of the contracts considered in these several cases, it would have resulted in preferring the creditor and would have availed nothing for the benefit of the estate. In other words, the contracts constituted liabilities of the estate, and in no sense could the trustee have elected performance. Thus, the filing of the bankruptcy petition followed by adjudi-

cation, might be considered as an anticipatory breach in that it took from the bankrupt that which the contract required for delivery to the creditor, and substituted therefor an obligation to pay the money value of the property, an obligation which the trustee could not have assumed.

In Re Swift, supra, decided by the United States Circuit Court of Appeals, for the First Circuit, presented the question as to the time when damages of the creditor should be determined, as between a voluntary assignment made by the bankrupt stockbroker, and the commencement of proceedings in bankruptcy, initiated by the filing of a *voluntary petition* by him. No demand by the creditor was made prior to bankruptcy, for his stock then held by the bankrupt. In determining that the market value of the stock at the time when bankruptcy intervened, was the proper measure of damages, and that demand was made unnecessary by the bankruptcy of the stockbroker, the court says (page 319):

> "As we have already said, the solution of the proper relations of the parties in this case growing out of the assignment, or out of the filing of the petition in bankruptcy, is fixed by the law; and the simple rule, based on fundamental principles, and traceable in the text writers and decisions of the courts for fully a century, must be applied, to the effect that, 'where a man has disabled himself from performing his contract, it is unnecessary to make any request or demand for performance.'"

Touching the subject of contingent claims, under the existing Bankrupt Act, the opinion further states (page 321):

> "However, we need not go into the troublesome questions that are raised by this omission, (failure of the present Act to provide for the proof and allowance of contingent claims), because we have already seen that in the case at bar the proceedings in bankruptcy rendered unnecessary a demand and tender, and, like the great mass of matters affected by such proceedings, we must hold that this proof of debt relates to the time when they were commenced. From that time the stocks in question were put beyond the power of the stockbrokers to deliver effectually. The contract ripened simultaneously with the beginning of the proceedings in bankruptcy, as the consequence thereof in connection with the adjudication which followed."

The opinion of District Judge Lowell, in the foregoing case (105 Fed. Rep., 493; 5 Am. B. R., 335), affirmed on appeal, contains the following statement in its concluding paragraph (page 500):

> "Bankruptcy does not work a breach of all contracts. In some cases the benefit of the contract does not pass to the trustee. *Streeter* v. *Sumner*, 11 Fost. (N. H.) 542. In others the trustee may adopt the contract, and thus keep it alive. But this case is wholly outside the classes mentioned. Not only has not the trustee adopted the contract in this case, but manifestly he could not do so; for to adopt it would be a preference of this creditor, and an injustice to all others. That in a case like this the creditor may treat the contract as broken by bankruptcy seems to me obvious, and in this instance the creditor has done so."

In Re Pettingill & Co. (*supra*), likewise decided by Judge Lowell, the question involved was as to the liability of the bankrupt's estate, upon his guar-

anty to pay dividends upon stock of a corporation which was adjudicated bankrupt shortly after the bankruptcy of the guarantor. Liability of the estate was restricted to such dividends as had accrued at the time of the guarantor's bankruptcy. As to dividends thereafter to accrue, the court held, that the claim was so contingent in its nature, dependent upon corporate action, as to make it non-provable. The liability resting upon the bankrupt could be discharged only by payment of the dividends guaranteed. There was nothing for the trustee of the bankrupt's estate to assume, except the obligation to make the payment, the result of which would have been, as pointed out by Judge Lowell in the preceding decision, to prefer the creditor. Hence, it could properly be held, that the guarantor's bankruptcy disabled him from further performance of the guaranty and resulted in a claim for damages, for the breach, provable against the estate.

In Re Neff (*supra*), the United States Circuit Court of Appeals for the Sixth Circuit, considered the liability of the bankrupt upon certain instruments in writing, whereby he undertook to pay specified sums of money, upon surrender of stock certificates which had been purchased at his instance, by third parties, in corporations which he had promoted. Prior to the maturity of these obligations, his bankruptcy occurred, and proof was made by the claimants, upon the bankrupt's several obligations in writing, together with a tender of the stock by the claimants to the trustee. It was admitted that the corporations whose stock was involoved,

were insolvent before Neff's bankruptcy occurred. While the court ruled in favor of the provability of the claims presented, it does not appear clearly from the opinion, whether the claims were regarded as fixed liabilities, absolutely owing at the time of the bankruptcy, although not then payable, or whether they were considered as based upon contract within Subdivision 4 of Section 63a of the Bankrupt Act. As previously pointed out by us, the obligation of the bankrupt's estate, in this case, required the payment of money, and the assumption of the contractual obligation by the bankrupt's trustee would have preferred the creditor. Hence, the bankrupt's inability to perform, might afford some justification for applying the principle of anticipatory breach. But it is doubtful, within the terms of the decision of this Court, in *Roehm* v. *Horst* (*supra*), whether this doctrine has any proper application to contracts for the payment of money only.

In the case styled, "*In Re Inman & Co.*," 22 Am. B. R., 524, claim was made against the estate for damages arising out of the breach of a contract, whereby the claimant was employed for ten months beginning on October 1, 1907. His employment was continued until May 4, 1908, when adjudication of the firm of Inman & Co. was entered on a creditors' petition filed against them. The Referee disallowed the claim, which order was reviewed by District Judge Newman. The opinion considers the cases at length, and in sustaining the Referee's order, holds, that involuntary bankruptcy proceedings do not constitute an anticipatory breach of contract,

giving to the claimant the right to prove damages. The inquiry is thus epitomized by the court (page 527):

> "Whether, where proceedings in involuntary bankruptcy are instituted, followed by an adjudication, and the bankrupt is a party to a contract of employment not terminated, this of itself is a breach of the contract on the part of the bankrupt, or is the contract simply terminated and annulled by operation of law without any default on the part of the bankrupt? The latter being true, there is no cause of action arising as for a breach of contract."

After ruling that the claim presented by the employee was contingent in its character, and hence not provable within *Dunbar* v. *Dunbar*, 190 U. S., 340, the court says, commenting upon *Watson* v. *Merrill*, 136 Fed., 359 (page 535):

> "It will be seen from the foregoing that the conclusion reached in this case of *Watson* v. *Merrill*, was that claims for future rent, and probably, from the language used in the opinion, for future personal services, are not provable in bankruptcy, though the reason given therefor is entirely different from that given in the other cases. According to this last opinion contracts such as those in question here will remain of force and unaffected by the bankruptcy proceedings. *Bailey* v. *Loeb*, 2 Fed. Cas. 376, was decided under the Act of 1867 by Circuit Judge Wood, afterwards a Justice of the Supreme Court. An extract from the opinion in that case will show the view that Judge Wood entertained of the matter, as follows:
>
> "'For instance, a business man has a manager or bookkeeper hired by the year, at a salary payable quarterly. At the end of two months he is adjudicated bankrupt. His man-

ager or bookkeeper may prove for a proportionate part of his salary up to the time of the bankruptcy, but he can not prove for any part that may accrue and fall due after the bankruptcy. The clear purpose of the Bankruptcy Act is to cut off all claims for rent to accrue, or for services to be rendered, after the date of the bankruptcy.'

"The fact that this decision by Judge Wood was under the Bankruptcy Act of 1867 strengthens it as an authority, because it is generally conceded that the Bankruptcy Act of 1867 was more liberal as to the proof of claims for contingent liabilities than is the present Act."

In another branch of the same case, reported in 23 Am. B. R., 566, decided by the same District Judge, it was held, that for breach by bankruptcy, of a contract to purchase from five hundred to seven hundred bales of patches, part of which had been delivered before bankruptcy of the vendee occurred, a claim for damages resulting therefrom was not provable. No breach had occurred, prior to the filing of the creditors' petition, nor had the vendee refused to perform the contract or given notice of a refusal to carry out its terms. The court says (page 568):

"I do not believe that, where involuntary proceedings in bankruptcy are instituted, and the bankrupt's business and effects are taken charge of by the court, and administered for the benefit of creditors, it constitutes such a breach of an executory contract as to authorize proof in bankruptcy for the amount of damages claimed to have been caused by the failure to carry out the contract, nor do I think that any of the cases cited go to this extent. The closest case to it, probably, is the case of *In re Neff*,

157 Fed., 57. The report of this case does not disclose whether it was an involuntary or a voluntary proceeding, probably the latter, from the decision.

"The case cited in the opinion in *Re Inman & Co.* (171 Fed., 185), of *Malcomson* v. *Wappoo Mills et al.*, 88 Fed., 680, if sound, is, I think, conclusive of the question here presented. Judge Simonton, it is true, concedes in his opinion that the question is not free from doubt, but decides, as will be seen from an examination of the opinion, to follow the decision of the Court of Appeals of New York. *People* v. *Insurance Co.*, 91 N. Y. 174. I agree with this view."

In *Lesser* v. *Gray*, 8 Ga. App., 605, the claim sought to be proved by Lesser against the estate of Inman & Co. (involved in the case last referred to), was urged in a plenary action commenced by Lesser in the City Court of Atlanta. This suit proceeded on the theory that provability of the claim and its allowance having been denied, it was not covered by the bankrupts' discharge. A demurrer to the petition was interposed, on the ground among others, that the contract was rendered impossible of performance, not by the act of the parties, but by the law itself, and this is the only ground considered by the court in its opinion. While the decision proceeds in part upon the theory that the adjudication of Inman & Co. as bankrupts terminated the contractual relation (which is at variance with the better considered cases), it is authority for the contention here made, that bankruptcy is not the equivalent of a breach, and hence no provable claim results. The court says (page 611):

"The contract in the present case did not constitute a fixed liability absolutely owing by the bankrupts at the time of the filing of the petition in bankruptcy. It is admitted that at that time there was nothing due on the contract. It had been partially performed by both parties thereto, up to that date. It was therefore a contingent liability against the bankrupts. If there had been no bankruptcy proceedings, it might never have been breached by the bankrupts. It might have been broken by the plaintiff in error. There are many contingencies that might have prevented the contract from becoming a fixed debt against the firm of Inman & Co., or any member thereof. The Supreme Court of the United States, in the case of *Dunbar* v. *Dunbar*, 190 U. S., 340, holds, that Section 63a of the bankruptcy act, is not broad enough to include contingent liabilities of any character. Mr. Justice Peckham, speaking for the court, says:

"'We do not think that by the use of the language in Section 63a, it was intended to permit proof of contingent debts or liabilities or demands, the value or estimation of which it was substantially impossible to prove.'

"As we have seen in the former part of this opinion, the adjudication in bankruptcy, did not constitute an anticipatory breach of the executory contract, and therefore such contract did not constitute an existing debt absolutely owing against the bankrupt, which could be proved, and from which he was discharged. It was simply a contingent liability, which was discharged by operation of law on the filing of the involuntary petition, followed by adjudication. In other words, it was not a debt then existing against the bankrupt estate, and the argument of learned counsel on this line is not applicable to executory contracts of this character. In our opinion, the judgment of the trial court

> sustaining the demurrer and dismissing the petition should, for the reasons above stated, be affirmed."

The judgment thus rendered, was reviewed by this Court, on writ of error to the Court of Appeals of Geogia: *Lesser* v. *Gray*, 236 U. S., 70; 34 Am. B. R., 8, and affirmed. In its opinion, the Court declined to enter upon a consideration of the specific reason assigned by the state court for sustaining the demurrer, thereby leaving the question presented by the instant appeal open and unanswered.

This Court, however, took occasion to say, that: "A disallowed claim and a non-provable debt are not identical things; and a failure accurately to observe the distinction has led to confusion in argument." Attention is here directed to the order entered by the Referee, in the case at bar (Trans., 9), wherein there is a specific finding that the claimant (Chicago Auditorium Association), has not a provable claim, against said bankrupt estate, except as to the sum of $311.20, and ordering that appellant's objections to the claim be sustained, except as to the portion thereof which accrued prior to bankruptcy.

The District Judge, on review, confirmed the order of the Referee, in these words (Trans., 13):

> "It is Ordered by the Court that the order entered herein by said Referee disallowing the claims of said petitioners be and the same is hereby confirmed."

The first conclusion of law, stated by the Court of Appeals, is as follows (Trans., 32):

> "That the intervention of bankruptcy, as recited, constituted anticipatory breach of the contract in suit for which damages are provable in bankruptcy."

Accordingly, in the instant appeal, the questions for determination by this Court, do not pertain primarily to the allowance of the claim asserted by appellee, except as this result accrued from and is involved in holding the claim susceptible of proof.

In the case styled, "*In Re Imperial Brewing Co.,*" 16 Am. B. R., 110, the claimant undertook to sell and deliver to the bankrupt, a quantity of hops, during the years 1905 to 1910 inclusive. The claimant alleged that the agreement was breached by the adjudication in bankruptcy, and sought to have its damages liquidated and allowed against the bankrupt's estate. The court was therefore called upon to determine whether by the adjudication of the Brewing Company, the whole executory contract was matured in such a way as to entitle the claimant to prove its damages against the estate, and thereby secure the allowance of its claim. Provability and allowance of the claim for damages was denied, the court relying upon the case of *Watson* v. *Merrill*, 136 Fed. Rep., 363. District Judge Phillips, reviewing the decisions sustaining provability of claims in bankruptcy, says (pages 111-112):

> "While the petition herein states that the Imperial Brewing Company was permanently disabled from performing said contract and repudiated the same in all its parts, and that it retired permanently from business and was hopelessly insolvent, etc., these results are al-

leged to follow 'by reason of said bankruptcy proceedings.' At the time of the adjudication in bankruptcy there was no debt owing by the bankrupt to the claimant. There had been no delivery or tender of delivery prior thereto, and none since. It may be conceded as the law of this jurisdiction that where a party is bound from time to time, as expressed in the contract, to deliver articles to be manufactured or products to be grown, each parcel as delivered to be paid for at a certain time and in a certain way, a refusal by the vendee to be further bound by the terms of the contract or to accept further deliveries constitutes a breach of the contract as a whole, and gives the vendor a right of action to recover the damages he may sustain by reason of such refusal. In such case the positive refusal of the vendee to perform when tender is made, or notice by him to the vendor before maturity of the time for delivery that he will not carry out the contract, will release the vendor from making any tender, and entitle him to an action in advance of the fixed period for delivery on his part to recover damages as for breach of the whole contract. *Roehm* v. *Horst*, 178 U. S., 1.

"The sole reliance of the claimant to bring it within this rule for such breach is predicated of the adjudication in an involuntary proceeding in bankruptcy against the vendee. I am unable to consent to the proposition that such an adjudication in bankruptcy, *ex vi termini*, is in law tantamount to a refusal of the bankrupt to perform, or that it thereby permanently disabled itself from performance, to bring the claim asserted by petitioner within the operation of the rule laid down in *Roehm* v. *Horst*, *supra*."

Referring to the effect of adjudication in bankruptcy of a corporation upon its continued corporate existence, the court thus observes (page 113):

> "An adjudication in bankruptcy of a corporation does not work a dissolution of the corporation or a forfeiture or loss of its franchise. The very policy of the bankrupt law is that by the adjudication and the surrender to the trustee of all assets of the bankrupt then owned he may thereby be manumitted from the burden of existing debts, and by his unimpeded energies and industry the better be enabled to prosecute his business and earn a livelihood and a competency. Why should any different rule be applied to a corporation coerced into bankruptcy, which but represents the aggregate co-operation and capital of a number of individual stockholders? Its stockholders may decide to infuse new life into it by assessments or otherwise, and its directors resume business, go ahead, and perform any executory contract. And if they had an advantageous contract with the vendor for providing it with hops in its business, why should it not be left in position to avail itself of the yet unexecuted contract?"

In Matter of Montague & Gillett, Inc., 32 Am. B. R., 106, District Judge Hand considered the provability of a claim upon a written contract for future services asserted by the vice-president of the bankrupt corporation. In reviewing the authorities and ruling against provability, the court says (page 107):

> "It seems to me rather strange that the courts should not at least have distinguished between voluntary and involuntary cases, and with due deference I find it quite impossible to see how the mere filing of an involuntary petition against a man can be an anticipatory breach, whatever may be said for the adjudication. Yet the filing day is always the test. However, this is a voluntary case and that question does not arise. If free to decide, I should not hold that

even voluntary bankruptcy was either the equivalent of a wrongful discharge as here, or an anticipatory breach. Compositions take place, the bankrupt gets backers, and creditors are held off, even in the case of a corporation; bankruptcy is by no means always the equivalent to a final repudiation of the contract. *Phoenix Nat. Bank v. Waterbury*, 197 N. Y. 161; 23 Am. B. R., 250. Moreover, though the consideration does not perhaps apply in the case of personal services, which are not assignable, I am quite unable to reconcile the doctrine of anticipatory breach with the right of the trustee in bankruptcy to assume the contract *cum onere*. *Lovell* v. *St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, sometimes cited, does not control, for an insurance company's contract certainly involves the retention of its assets pending the maturing of the policy. However, in view of the authority to the contrary, I shall not decide that bankruptcy does not give the servant the right to treat himself as discharged, but shall for the sake of argument treat it as such.

"Yet even treating the bankruptcy as a discharge I think that the claim remained contingent, for a wrongful discharge, like all other wrongful attempts to terminate a contract, while it gives the other party himself the right to terminate, imposes upon him no obligation. *Phoenix Nat. Bank* v. *Waterbury*, 197 N. Y. 161; 23 Am. B. R. 250. The servant may sue at once by hypothesis for all his wages, but he may also wait until they become due and then sue. It is true that by waiting he subjects himself to the risk of having taken by way of set-off the estimated value of his services, rather than his actual earnings, but that is all he assumes. * * * Therefore, the case seems to me throughout analagous to *Re Roth & Appel*, *supra*, where the lessor's claim was disallowed upon a covenant to pay the loss if the lessor re-entered and relet after bankruptcy."

The result of the foregoing decisions, applied to the facts at bar, demonstrates that the claim here asserted for damages is not a provable claim under the statute. It being admitted that the contract was duly performed when bankruptcy of the Transfer Company occurred, it must be held, in order to bring appellee's claim within the category of provable debts, that the filing of the creditors' petition in bankruptcy, culminating in adjudication, in and of itself amounted to a breach of contract at the moment proceedings in bankruptcy were commenced. If such is the consequence, it rests with the non-bankrupt party to the contract, to exercise his option, to declare such bankruptcy a breach, and thereupon to terminate the bankrupt's rights therein. This is hardly to be reconciled with the right accorded to the bankrupt's trustee of assuming or renouncing performance of the bankrupt's executory contracts, a right which has always been recognized under bankruptcy statutes, and which is sustained by the cases referred to under IV A of our brief.

Again, since insolvency in and of itself does not constitute a breach of an executory contract by anticipation or otherwise, it requires something more to ripen the claim for damages than the mere filing of a petition in bankruptcy, and consequent adjudication. Such conditions as may develop subsequent to the commencement of proceedings, can not influence the decision as to whether the claim for damages is provable. This is tested alone by the conditions existent immediately upon the filing of the petition in bankruptcy.

As heretofore stated, Section 63a (4), authorizes

the proof and allowance of debts of the bankrupt, predicated upon contract express or implied, absolutely owing at the time of filing of the petition in bankruptcy. Unless, therefore, the position can be sustained that the filing of such petition followed by adjudication, itself amounts to a repudiation by the bankrupt of his executory contracts, the claim is not brought within the terms of the statute.

The cases cited recognize that impossibility of performance of a contract, created by law, excuses the breach. While the causes which bring about the filing of a creditors' petition in bankruptcy, are often attributable to the bankrupt himself, those causes can not be relied on to justify termination of an executory contract. What immediately brings about this result, as held by the Court of Apeals, is the commencement of bankruptcy proceedings initiated by the filing of a petition, whether voluntary or involuntary. In the former case, there may be some semblance of logic for holding that the act of the bankrupt himself amounts to a repudiation. And even in this case it is difficult to see how a judicial declaration of insolvency amounts to a complete repudiation or disablement from performance of an existing contract. In involuntary proceedings, however, the case is clear, since the judicial declaration of insolvency is produced not by the immediate act of the bankrupt, but as a result of adverse proceedings instituted by creditors. This, as already pointed out, should properly be regarded as the equivalent of a legal impossibility of and therefore excuse from performance of the contract.

B.

In any view, the resulting claim for damages is, we submit, so contingent in its nature, as to fall without the terms of the statute. The test, as to whether a claim is really contingent, is thus stated by Remington, in his recent text on Bankruptcy, Vol. 1, Sec. 641:

> "Have all the facts necessary to be proved to fasten liability already occurred? If so, the claim is not contingent, although the liability and the extent of damages may not yet have been ascertained by the consideration of a court as evidenced by judgment or decree, nor even the full extent of damages arising been already suffered. The contingency, in other words, is a contingency of facts necessary to fasten liability at all, not a contingency of the court's judgment on the facts nor a contingency as to the extent of the damages resulting from the injury."

In *Dunbar* v. *Dunbar*, 190 U. S., 340; 10 Am. B. R., 139, suit was commenced to recover on a contract providing for the payment of a specified sum for the support and maintenance of the plaintiff and her children. The defendant had undertaken, by agreement in writing, to pay to the plaintiff, "during her life, or until she marries, for her maintenance and support, yearly the sum of $500." The defendant pleaded a discharge in bankruptcy, obtained subsequent to the accrual of liability on the contract. This court affirmed the judgment of the Superior Court of Massachusetts, in favor of the plaintiff, holding that the contract so far as it related to the payment to the wife, during her life or widowhood, was not such a contingent liability,

as the Act of 1898 made provable. In the course of its opinion, this Court says (page 345):

> "Conceding that the Bankruptcy Act provides for discharging some classes of contingent demands or claims, this is not, in our opinion, such a demand. Even though it may be that an annuity dependent upon life is a contingent demand within the meaning of the Bankruptcy Act of 1898, yet this contract, so far as regards the support of the wife, is not dependent upon life alone, but is to cease in case the wife remarries. Such a contingency is not one which, in our opinion, is within the purview of the act, because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood."

After referring to certain decisions construing the English statutes, the Court further says (pages 349, 350):

> "Section 63a provides for debts which may be proved, which, among others, are (1): 'A fixed liability, as evidenced by a judgment or instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with interest thereon which would have been recoverable at that date, or with a rebate of interest on such as were not then payable and did not bear interest' (4) 'founded upon an open account or upon a contract, express or implied.' In Section 63b provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph *b*, however, adds nothing to the class of debts which might be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim, coming with-

> in the provisions of section 63a, to be liquidated as the court should direct. We do not think that by the use of the language in section 63a it was intended to permit proof of contingent debts or liabilities or demands, the valuation or estimation of which it was substantially impossible to prove."

In *Cotting* v. *Hooper, Lewis & Co.*, 34 Am. B. R., 23, the defendant corporation made a voluntary assignment for the benefit of its creditors, which contained a provision for distribution to creditors, on claims provable in conformity with the Bankruptcy Acts of the United States. The lease existing between the plaintiffs and the defendant, provided that upon termination, the lessors should be entitled to indemnity against loss of rent and other payments, or, at their election to demand as damages, the difference between the rental value of the premises, and the rent reserved by the lease. The trustee having refused to recognize their claim for damages, the plaintiffs filed a bill, asking that such damages be ascertained and allowed against the estate. A decree, sustaining a demurrer to the bill, was affirmed, upon the ground that the claim presented was contingent and hence, tested by the bankruptcy statute, not provable. The Supreme Judicial Court of Massachusetts by Justice Brayley, says (pages 24-25):

> "It was said in *Dunbar* v. *Dunbar* (*supra*), that the purpose of Section 63b was to permit an unliquidated claim coming within the terms of Section 63a to be liquidated as the court might direct; and in *Zavelo* v. *Reeves* (*supra*), that the debts or claims provable under the several classes of liabilities of section 63 are

debts or claims which existed at and before the filing of the petition. It follows that omissions can not be supplied by construction based on the U. S. St. of 1867, C. 176, Sec. 19, providing for the proof of contingent liabilities, and the liability of the bankrupt is to be ascertained solely as of the date of filing the petition. If the existence of the debt or claim, whether liquidated or unliquidated, is then contingent, it is not provable."

Further, the court says (pages 25, 26):

"The right of termination under either covenant (for indemnity against loss of rent, or for the difference between the rental value and the rent reserved), was optional with the lessors, 'who may immediately or at any time thereafter' enter upon and repossess the demised premises. The right might or might not be exercised. If not exercised the lessee remained bound by the covenant for rent. If exercised, then at their election upon repossession they could rely on either the covenant for indemnity or the covenant for damages, but the rent ceased. The period of decision could not begin until the assignment had become operative and there could be no termination until an actual entry. It is admitted that the plaintiffs promptly entered, yet the right to either indemnity or damages did not accrue until entry, when the leasehold estate was divested and terminated. The lessors could not have both indemnity and damages, and of course further affirmative action must be taken by making an election, which they did by bringing the present suit. It would seem to be manifest that at the date of the assignment the claim for damages was a contingent and not an existing demand, presently due, but not presently payable, even if resting upon a contract and capable of liquidation."

In the case styled "*In Re D. Levy & Sons Company*," 31 Am. B. R., 25, the specific question presented was, whether installments of salary, which had not been earned, and were not due at the time of the filing of an involuntary petition in bankruptcy, constituted debts absolutely owing and provable against the estate. While refusing to rest his decision upon the distinction drawn between voluntary and involuntary proceedings in bankruptcy, as creating an anticipatory breach of contract, District Judge Rose denied provability to and allowance of the claim, following *In re Roth & Appel*, 181 Fed. Rep., 688. The court says (page 28):

> "The compensation contracted to be given in the future for services still to be rendered is a sum stipulated to be paid for such services. The rendition of the services is the consideration for them. If the right to demand such services terminates, the obligations to pay for them ceases, precisely as in the case of rent."

In *Re American Vacuum Cleaner Co.*, 26 Am. B. R., 621, a claim arising out of the alleged breach of an employment contract was passed upon by the United States District Court, for the New Jersey District. The claimant was employed by the bankrupt, under a contract which had a number of months to run, when bankruptcy of the employer occurred. Nothing was due the claimant at that time, but claim was made for salary due for one month, immediately following the filing of the petition, at the end of which time the claimant secured another position. District Judge Rellstab, in affirming the Referee's order of disallowance, says (pages 622-623):

"The contract relied upon at the filing of the petition was executory, and no breach had been committed by the bankrupt. No debt was owing by it at such time. The breach was the result of the operation of the Bankruptcy Act; and though the causes permitting the intervention of such act are chargeable to the bankrupt, they can not be said to be anticipatory breaches, so as to admit of the proving of claims not then accrued.

"The Bankruptcy Act of 1898, unlike its predecessor, does not include contingent claims, an omission which was held to be significant in *Dunbar* v. *Dunbar, supra,* and *In re Roth & Appel* (C. C. A., 2d Cir.), 24 Am. B. R., 588, 181 Fed., 667, and which led the courts in those cases to disallow claims which had not accrued at the time of the institution of the bankruptcy proceedings. The logic of these decisions is to give preference to fixed, as against contingent liabilities. The time when this characteristic of the claim is to be determined is when the administration in bankruptcy begins—the filing of the original petition. *Sexton* v. *Dreyfus,* 219 U. S., 339, 25 Am. B. R., 363. In the absence of statutory language expressly directing the allowance of contingent claims, the holder will not be permitted, in bankruptcy proceedings, to share in the distribution of the assets with those creditors whose claims were absolute at the filing of the bankrupt's petition."

In *Williams et al.* v. *U. S. Fidelity & Guaranty Co.*, 236 U. S., 549; 34 Am. B. R., 181, the Court considered the effect of a discharge in bankruptcy, upon the express obligation of the principal to indemnify his surety against loss, by reason of their joint bond, conditioned to secure his faithful performance of a building contract broken prior to the bankruptcy, when the surety paid the consequent

damage thereafter. Dealing with the subject of contingent claims, Mr. Justice McReynolds, speaking for the Court, says:

> "Although, unlike the act of 1867, the present one contains no express provision permitting proof of contingent claims, it does in substance afford the surety on a liability susceptible of liquidation the same relief possible under the earlier act, *i. e.*, application to the principal debt of all dividends declared out of the estate (act of 1867, Secs. 19, 27)."

Applying the tests pointed out in the foregoing cases, for definition of contingent claims, it is manifest that the claim presented by appellee falls within the rules announced, and upon this account is non-provable. Such contingencies are manifold. Necessarily, the option which the promisee must exercise, to declare the contract terminated, and thereby assert a claim for damages against the bankrupt estate, can not be exercised until bankruptcy intervenes. The option may never be exercised by the promisee, and so no claim for damages will arise. But even if exercised, the trustee has a reasonable length of time, after election and qualification, to assume or renounce performance of the bankrupt's executory contracts. (*Sparhawk* v. *Yerkes*, 142 U. S., 1, 13; *Sessions* v. *Romadka*, 145 U. S., 29; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Hurley*, 153 Fed. Rep., 503; 18 Am. B. R., 396, 404.) Contingent upon the trustee's option, the contract may or may not be performed by him. If renounced, the bankrupt is reinstated in his right to perform, it being now generally recognized that the contract-

nal relation is not interfered with nor affected by the adjudication in bankruptcy. (*Watson* v. *Merrill*, 136 Fed. Rep., 359; 14 Am. B. R., 453.)

If there had been no bankruptcy proceedings, the contract might have been breached by the appellee. Performance by the bankrupt, had bankruptcy not occurred, would likely have continued. If after bankruptcy terms of composition had been offered, and accepted by creditors, the bankrupt would have become reinvested with title, to all of its property and assets, including the contract at bar. But if the bankruptcy itself is held to operate as a breach, which at the promisee's election terminates the contract, what becomes of the bankrupt's right upon composition being confirmed, to continue with the performance of its executory contracts, which may be of large value, and the preservation of which may be the incentive in many instances for effecting a composition?

In construing the option provision of the contract, the Court of Appeals held, that the six months period therein provided for, limited the liability of the bankrupt's estate to damages which appellee claims to have incurred. This was upon the theory that the contract was rendered indefinite and uncertain for any future term of service. The same observation can be made as to the further option embodied in the contract, whereby if default in the payment of any installment of money due under the contract, or in the performance of any other covenant or promise shall occur, and such default continue for thirty days, the privileges and concessions granted to the bankrupt were terminable

without notice, in which event the bankrupt continued liable upon its covenants. No default having occurred when bankruptcy of the Transfer Company intervened, it may be urged with like effect, following the reasoning of the Court of Appeals, that future performance of the contract, was rendered so indefinite and uncertain, that no claim in favor of appellee resulted when bankruptcy intervened. The default under the second option clause referred to, must continue for thirty days, hence no claim under this provision could be brought within the precise terms of the Bankrupt Act, defining claims provable against a bankrupt estate. The rent cases, so-called, are rested upon the contingencies which inhere in claims based upon the breach of leasehold contracts.

III.

SUBSEQUENT INSTALLMENTS OF RENT OR DAMAGES FOR ALLEGED BREACH THROUGH BANKRUPTCY, OF ONE OF THE PARTIES TO A LEASEHOLD CONTRACT, ARE NOT PROVABLE IN BANKRUPTCY.

It is uniformly held, that installments of rent, accruing subsequent to the bankruptcy of the tenant, do not constitute debts, evidencing a fixed liability provable against the bankrupt's estate. The cases to which we direct the Court's attention, upon this subject, involve claims for damages, predicated "upon contract express or implied," within clause 4 of Section 63a of the Act.

In *Watson* v. *Merrill*, 14 Am. B. R., 453, the bankrupt was obligated, as tenant on a lease of premises which he occupied, when his bankruptcy

occurred, which lease was to run for the period of ten years. Intervening the filing of the petition and adjudication thereon, the bankrupt surrendered possession of the premises to the landlord, under an agreement whereby he acknowledged himself indebted for $2,300, as damages sustained by the landlord. Thereafter proof of claim was filed for this amount, against Brown's estate in bankruptcy, together with a petition on behalf of Watson, the landlord, praying for liquidation of the claim. The Referee found the rental value of the premises to be less than the rent reserved by the lease, and accordingly allowed the difference as damages for the breach. On review, the District Judge reversed the Referee and disallowed the entire claim, which order was affirmed by the Court of Appeals for the Eighth Circuit. The Court says (page 458):

> "When the petition in bankruptcy was filed, no rent was due and unpaid. There was therefore no debt owing by the lessee to Watson, and the latter had no legal demand or claim against him under the lease. The future existence of any such claim or demand, and its amount, if it ever came into existence, were contingent upon (1) the future default of the lessee; (2) the exercise by the lessor of his option to resume the possession of the leased premises if such a default should occur; and (3) upon the assumption of the lease by the trustee in bankruptcy. For the latter had the option to take the leasehold estate, and to assume the payment of the agreed rents. * * *
>
> "An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt, notwithstanding the decisions to the contrary in *In re Jefferson* (D. C.), 2 Am. B. R., 206; 93 Fed., 448; *Bray* v. *Cobb* (D. C.), 3 Am.

B. R., 788, 100 Fed., 270; and *In re Hays, Foster & Ward Co.* (D. C.), 9 Am. B. R., 144, 117 Fed., 879. Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contracts or obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements, and subject to the liabilities he has incurred. * * *

"One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years; he agrees to purchase or to convey property; and he then becomes insolvent and is adjudicated a bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rents, to render the services, and to fulfill all his other obligations, notwithstanding the fact that his insolvency may render him unable immediately to do so."

In *Colman Co.* v. *Withoft*, 28 Am. B. R., 328, the bankrupt was jointly liable on a lease with the Colman Company. Prior to bankruptcy, an agreement had been entered into between the parties, whereby each assumed, as between themselves, a several liability for one-half of the rentals reserved. A subsequent agreement before bankruptcy, provided that the Colman Company should procure a rescission of the lease, for which it might pay a sum not to exceed one hundred dollars per month, for the unexpired term, and that the bankrupt would pay one-half of such amount to the Colman Company. After

the filing of the petition in bankruptcy, rescission of the lease was obtained, in consideration of the payment of $2,400, and for one-half of the sum thus paid, claim was made against the bankrupt's estate. The District Court set aside the Referee's order of allowance and directed that the claim be disallowed, which order was affirmed on appeal by the Circuit Court of Appeals, for the Ninth Circuit. The Court says (page 231):

> "At the time when the petition was filed, not only was the bankrupt not indebted to the appellant, but it could not then be known that he ever would be indebted to it, either for money to be paid for rent or for money to be paid for the rescission of the lease. As far as the rent was concerned, there were the contingencies that the lessee might cancel the lease, or that the trustee in bankruptcy might elect to pay the rent, or that the appellant might fail to pay more than its half thereof. As to the agreement looking to a rescission of the lease, there were the contingencies that the agreement, which was without consideration, might be revoked by either party thereto before it was acted upon, or that it might be impossible to secure rescission on the terms stipulated by the bankrupt."

In matter of Roth & Appel, 24 Am. B. R., 588, the bankrupts were lessees in a lease of certain premises for the term of five years, beginning February 1, 1908. January 20, preceding, an involuntary petition in bankruptcy was filed against them, which passed to a decree of adjudication May 27, 1908. The lease provided, for termination and the right of re-entry upon the bankruptcy of the lessee, and for indemnity based on the difference between

the rents reserved and such amounts as the lessor could collect, using due diligence. A new lease was made by the lessor, as a result of which he incurred a certain loss, over that agreed to be paid by the bankrupts. For this difference he sought allowance. After defining rent as being the consideration for the occupation of the land, obligation to pay which ceases when the right to occupy terminates, the Court rules that (page 594):

> "When the petition was filed the first step toward declaring the lessee bankrupt was taken. It was not certain that bankruptcy would follow, but if it did follow the lessor would have the right to re-enter and terminate the lease. Notwithstanding the provision that the lease should terminate in case the lessees should be declared bankrupt and the lessor should have the right to re-enter, the lease was undoubtedly terminable by the re-entry and not by the bankruptcy. But the lessor was not obliged to re-enter, and whether he would do so or not was manifestly dependent upon uncertainties. Indeed, looking at the claim as it existed either at the time of the petition or the adjudication, it was altogether contingent in its nature: (1) It was uncertain, as just pointed out, whether the lessor would re-enter and terminate the lease: (2) In case the lease were terminated it was uncertain whether there would be any loss in rents. If the rent received by the landlord from the new tenant equalled or exceeded that stipulated in the lease there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant."

Thereupon the Court concludes that the claim is not provable under the first clause of Section 63a. Against the contention that the claim, whether re

garded as a demand for rent, or as based upon the indemnity provision is a debt founded upon an express contract, and hence provable under the fourth clause of Section 63a, the Court holds (page 596):

> "The present bankruptcy statute, unlike—as we have seen—the acts of 1841 and 1867, does not provide for the proof of contingent claims. Taking the fourth subdivision of section 63a as being independent of the first subdivision, still there is nothing to indicate that it was intended to embrace wholly contingent demands. Indeed it is only by reading Section 63b—which permits the liquidation of unliquidated demands—in connection with said fourth clause of 63a that any ground is shown for contending that a claim like the one in question can be proved. But this construction expands the provisions of section 63a by those of 63b, and it is well settled that such a construction cannot be adopted. Section 63b adds nothing to the class of debts provided under 63a. It merely permits the liquidation of an unliquidated claim provable under the latter provision. * * *
>
> "For these reasons we think that the claim of the appellant, whether regarded as one for unaccrued rent or for indemnity for loss of rent, was not provable against the bankrupt estate under either section 63a (1) or 63a (4) and was properly expunged by the District Court."

In *Slocum* v. *Soliday*, 25 Am. B. R., 460, claim was made for the equivalent of rent during the unexpired term of the lease, subsequent to bankruptcy. The lease provided that if the lessee be declared bankrupt, the lessor may lawfully enter upon the demised premises, in which event the lessee covenanted, among other things, that it would pay to

the lessor as damages a sum which at the time of the termination of the lease or at the time to which installments of liquidated damages shall have been paid, represented the difference between the rental value of the premises and the rent and other payments for the residue of the term. The Court considers the claim of the landlord, both from the standpoint of the ordinary relations and incident liabilities, as between landlord and tenant, and also by reason of the special provision of the lease. Circuit Judge Putnam says (page 463):

> "The whole of this special provision of the lease has no operation, except from the time when the lessors enter into or upon the premises as provided therein. This entry clearly could not be made in a case in bankruptcy, except on the condition that the lessee had already been petitioned into bankruptcy, or declared bankrupt. To the common apprehension, the entry could not occur, either in fact or in theory of law, until after the petition in bankruptcy had been filed; and the order of things in the law is the same. Therefore no claim based on the particular provision referred to could have had existence, except in the possible undisclosed or disclosed intention of the lessors, prior to the filing of the petition in bankruptcy, or at the time of such filing. Any mere such intention, whether disclosed or undisclosed, would not be of effect to create a claim which the law would regard as provable. Whatever the intention may have been, there was no existing claim which could be proved in bankruptcy, until the lessors had exercised their option to enter, and had actually entered in accordance therewith. Until that time there was simply a contingency that there might be a claim; but neither under the present statutes in bankruptcy nor under

> any prior statutes was there anything in such a contingency which was capable of being proved against a bankrupt's estate."

The reasoning employed in the rent cases, we submit, is equally applicable to the instant appeal. While technical refinements are indulged in, the breach through bankruptcy is of the same effect applied to a leasehold contract as to other executory agreements. In the case at bar, upon the bankruptcy of the Transfer Company, it could not be said that the bankrupt would not render the services called for by the contract, nor that the payments required would not be forthcoming. Equally with the rent cases, the consideration for the payments and the rendition of services was the continued right of the bankrupt to enjoy the concessions and privileges conferred by the terms of the contract. The bankrupt was not in default when bankruptcy intervened, and as to the obligation to pay the installments provided for, there could be no default until August 1, 1911, inasmuch as the appellee by its proof of debt secured the allowance of its claim for such installments, including the entire month of July, 1911, whereas the bankruptcy of the Transfer Company occurred on July 22, 1911.

The contract by its terms was not assignable without the express written consent of appellee, but it did not provide against an assignment by operation of law. The services called for did not involve the exercise of special skill, nor were they based upon any relationship of confidence between the parties.

Accordingly, the contract was of such a nature as

would pass to the appellant should it elect to assume performance. (*Gazlay et al.* v. *Williams, Trustee*, 210 U. S.. 41; 20 Am. B. R., 18.)

In conclusion we respectfully submit that the holding of the Court of Appeals so expands the class of debts susceptible of proof in bankruptcy as to include practically all claims against an insolvent estate, unliquidated damages for tort alone excepted. This result is not consistent with the intention of Congress in enacting the present bankruptcy statute, more especially Section 63. Should this conclusion be adhered to, the pittance which creditors usually receive through administration in bankruptcy will still more be diminished. Commercial debts with which the statute is primarily concerned will be swelled to unlimited proportion should claims be allowed, such as is here involved.

We therefore respectfully urge that the interpretation of the Court of Appeals, in the light of the purpose of the Bankruptcy Act, is not tenable, and that the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1914.

No. 162

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Appellant,

vs.

CHICAGO AUDITORIUM ASSOCIATION,
Appellee.

No. 521

CHICAGO AUDITORIUM ASSOCIATION,
Appellant,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Appellee.

Appeal and cross-appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

Brief of Argument on Behalf of Chicago Auditorium Association, Appellee and Cross Appellant.

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STATUTES CITED.

IN THE

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Brief and Argument on Behalf of Chicago Auditorium Association, Appellee and Cross Appellant.

Upon the appeal there are two questions presented for the consideration of the court.

Did the filing of the petition in bankruptcy against the Transfer Company and the subsequent adjudication thereon constitute a breach of the con-

tract by which the Transfer Company agreed to furnish baggage and livery facilities to the Association during a period of years, and to pay a specified sum of money in monthly installments?

If there was such a breach of contract, does a claim for the damages occasioned solely thereby constitute a provable debt within the terms of the present Bankruptcy Act?

Upon the cross appeal, the question presented pertains to the provability of the Association's claim for damages arising after a period of six months subsequent to the bankruptcy of the Transfer Company.

POINTS AND AUTHORITIES.

I.

BANKRUPTCY CONSTITUTES A MATERIAL BREACH OF EXECUTORY CONTRACTS.

A. Disablement from performance is a breach of contract.

Roehm v. *Horst*, 178 U. S. 1.

B. Insolvency is often a disablement.

Chemical National Bank of Chicago v. *The World's Columbian Exposition*, 170 Ill. 82.

Bank of Commissioners v. *New Hampshire Trust Company*, 69 N. H. 621.

C. And similarly, the appointment of a receiver.

Pennsylvania Steel Company v. *New York City Ry. Co.*, 198 Fed. 721.

D. Or proceedings for liquidation under special statutes.

Lovell v. *St. Louis Life Insurance Co.*, 111 U. S. 264.

Carr v. *Hamilton*, 129 U. S. 252.

E. Bankruptcy is a complete disablement.

In re Swift et al., 112 Fed. 315.

In re Pettingill and Company, 137 Fed. 143.

In re Neff, 157 Fed. 57.

In re Duquesne Incandescent Light Co., 176 Fed. 785.

In re Dr. Vorhees Awning Hood Co., 187 Fed. 611.

II.

A CLAIM FOR DAMAGES FOR A MATERIAL BREACH OF AN EXECUTORY CONTRACT CAUSED BY BANKRUPTCY CONSTITUTES A PROVABLE DEBT.

Zavelo v. *Reeves*, 227 U. S. 625.

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In re Swift, 112 Fed. 315.

In re Pettingill and Company, 137 Fed. 143.

In re Neff, 157 Fed. 57.

In re Duquesne Incandescent Light Co., 176 Fed. 785.

In re Dr. Vorhees Awning Hood Co., 187 Fed. 611.

Pennsylvania Steel Co. v. *New York City Ry. Co.*, 198 Fed. 721.

Lesser v. *Gray*, 236 U. S. 70.

Grant Shoe Co. v. *Laird*, 212 U. S. 445.

A. The present case does not involve an anticipatory breach of contract.

Williston, Wald's Pollock on Contracts, pages 362, 363.

Lowe v. *Harwood*, 139 Mass. 135.

III.

THE CLAIM IS PROVABLE, ALTHOUGH THE DAMAGES ARE UNLIQUIDATED AND THE TRUSTEE HAS AN OPTION TO CONTINUE THE PERFORMANCE OF EXECUTORY CONTRACTS.

Grant Shore Co. v. *Laird*, 212 U. S. 445.

In re Swift et al., 112 Fed. 315.

Dunbar v. *Dunbar*, 190 U. S. 340.

Cobb v. *Overman*, 109 Fed. 65.

IV.

THE RULE AS TO THE MATERIAL BREACH OF A COVENANT TO PAY RENT DOES NOT APPLY TO THE MATERIAL BREACH OF EXECUTORY CONTRACTS.

Co. Litt, 292b, Sections 512-513.
In re Roth and Appel, 181 Fed. 667.
Watson v. *Merrill*, 136 Fed. 359.
Slocum v. *Soliday*, 183 Fed. 410.

V.

AN OPTION IN ONE PARTY OF CANCELATION UPON STIPULATED CONTINGENCIES DOES NOT, AFTER MATERIAL BREACH BY THE OTHER PARTY, AFFECT THE RECOVERY OF DAMAGES FOR BREACH OF CONTRACT BY THAT PARTY FOR WHOSE BENEFIT THE OPTION WAS INSERTED.

Dunbar v. *Dunbar*, 190 U. S. 340.

VI.

THE GENERAL POLICY OF THE BANKRUPTCY ACT FAVORS THE PROVABILITY OF CLAIMS FOR DAMAGES UPON EXECUTORY CONTRACTS MATURED BY BANKRUPTCY.

Williams v. *U. S. Fidelity Company*, 236 U. S. 549.

ARGUMENT.

I.

THE BANKRUPTCY OF THE TRANSFER COMPANY WAS A BREACH OF THE CONTRACT UPON WHICH THE CLAIM OF THE ASSOCIATION IS BASED.

In *Roehm* v. *Horst*, 178 U. S. 1, page 8, the court said:

> "It is not disputed that if one party to a contract has destroyed the subject-matter, *or disabled himself so as to make performance impossible*, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived."

There are few ways in which a corporation can disable itself from continuing to perform its obligations. The insolvency of a corporation, without bankruptcy, may amount to a complete disablement, and in such cases it has been held to constitute a breach of the corporation's contracts. *Chemical National Bank of Chicago* v. *The World's Columbian Exposition*, 170 Ill. 82, 92; *Bank of Commissioners* v. *New Hampshire Trust Company*, 69 N. H. 621. Similarly the appointment of a receiver of a corporation renders the corporation unable to continue to perform certain of its contracts, and, upon the refusal of the receiver to carry out a contract, a claim for damages for the breach will be enforced against the corporation's assets in the hands of the receiver. (*Penna. Steel Co.* v. *N. Y. Ry.*, 198 Fed. 721, 743, Cir. Ct. App., 2d Cir.) Certainly bank-

ruptcy is a more complete disablement than insolvency or the appointment of a receiver.

This court has twice held that the act of the superintendent of insurance of a state in proceeding against an insurance company for the liquidation of its affairs on the ground of insolvency amounts to a disablement of future performance of the policy contract with its assured and gives rise to an immediate right of action. *Lovell* v. *St. Louis Life Insurance Company*, 111 U. S. 264, 274; *Carr* v. *Hamilton*, 129 U. S. 252, 256. We do not perceive what distinction can be made between proceedings instituted by a state official against an insolvent company and proceedings by creditors against an insolvent debtor under the Bankruptcy Act; both are processes of liquidation provided by legislative authority and both, when instituted, cause a breach of certain executory contracts.

The lower federal courts have repeatedly held that bankruptcy constitutes a material breach of an executory contract.

In re Swift et al., 112 Fed. 315 (Cir. Ct. App., 1st Cir., 1901). The creditor had stock held on margin with a stock broker who voluntarily became a bankrupt. He sought to recover the value of the stock at the time of the filing of the petition in bankruptcy minus the amount still due on the stock. The court held that by local law the relation between a stock broker and his customer who had stock on margin was an executory contract for the purchase of the stock.

On page 321, the court said:

"* * * we have already seen that in the

> case at bar the proceedings in bankruptcy rendered unnecessary a demand and tender, and, like the great mass of matters affected by such proceedings, we must hold that this proof of debt related to the time when they were commenced. From that time the stocks in question were put beyond the power of the stock brokers to deliver effectually. The contract ripened simultaneously with the beginning of the proceedings in bankruptcy, as a consequence thereof in connection with the adjudication which followed."

In re Pettingill and Company, 137 Fed. 143 (Dis. Ct. Mass., 1905). A creditor of a corporation agreed to accept the stock of a second corporation in payment of his debt; the debtor corporation was adjudicated an involuntary bankrupt prior to the time at which it agreed to redeem the stock. Judge Lowell after referring to *Ex parte Swift* and *Ex parte Pollard, post,* said (page 147):

> "Bankruptcy itself may be treated as a breach of the bankrupt's contracts, analogous to that complete repudiation of the contract before the time of performance which was shown in *Hochster* v. *Delatour,* 2 E. & B. 678, and in *Roehm* v. *Horst,* 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, or to a complete disenablement of performance of the contract, as in *Frost* v. *Knight,* 7 Exch. 111."
>
> "The contract to redeem the stock three years after the date of issue may fairly be construed as a contract to purchase the stock at par at the time specified. As to the provability of the claim arising from the last mentioned contract, the question presented is this: can a claim for breach of the bankrupt's contract to buy goods at a fixed date after bankruptcy be proved in the bankruptcy proceedings? If his creditor so elects, and if the trustee does not elect to keep the contract alive, I am of opinion that proof is

possible by the analogy of *In re Swift*, 112 Fed. 315, 50 C. C. A. 264; *Hochster* v. *Delatour*, and *Roehm* v. *Horst*." (Page 148.)

In re Neff, 157 Fed. 57 (Cir. Ct. App., 6th Cir., 1907). A claim was presented against an involuntary bankrupt on a written agreement entered into prior to the bankruptcy, to repurchase certain shares of stock from the claimant at a time subsequent to the date of adjudication. The court discussed the doctrine of anticipatory breach, citing *Roehm* v. *Horst, supra; Lovell* v. *St. Louis Life Ins. Co., post*, held the claim provable, and on page 61 said:

> "'Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance.'"

In the present case the trustee of the Transfer Company did not elect to carry out the contract with the Association.

In re Duquesne Incandescent Light Co., 176 Fed. 785 (Dist. Ct. Pa., 1910). A corporation, having contracted to purchase from a manufacturer a certain number of brass burners a month, during a period of years, was subsequently adjudicated an involuntary bankruptcy; the goods had been partially manufactured but no deliveries had been made. The manufacturer filed a claim for damages for the breach of contract caused by the bankruptcy.

The court held that bankruptcy constituted a breach of contract, and on page 792 said:

> "So in the case at bar upon the filing of the petition in bankruptcy and the adjudication thereon, it was impossible for the bankrupt to accept a delivery of the goods and make pay-

> ment for them. A breach of the contract therefore occurred upon the filing of the petition, and the claimant was relieved from making tender of the goods."

In re Dr. Vorhees Awning Hood Co., 187 Fed. 611 (Dist. Ct. Pa. 1911). A corporation agreed to manufacture a patented awning under a license from the patentee, and to pay a bonus of 1 per cent. a foot, guaranteeing to manufacture 1,000 feet the first year and an increase in subsequent years; the contract was carried out and the required bonus paid for the first year. Subsequently the corporation was adjudicated bankrupt. The court allowed a claim for damages caused by the breach, saying on page 632:

> "Here bankruptcy put an end, not indeed to the obligation, but to further liability under it beyond the damages due to the breach which necessarily resulted."

Since the bankruptcy of the Transfer Company intervened after the contract had been partially performed, the present case involves a material breach of contract during performance, and not an "anticipatory breach" of contract (Williston, Wald's Pollock on Contracts, pages 362, 363; *Lowe* v. *Harwood*, 139 Mass. 133, 135, 136), although the court below and appellant's brief have so considered it. A discussion of the doctrine of anticipatory breach, as applied to the *repudiation* of contracts prior to performance (appellant's brief, pages 17 *et seq.*) or as creating an option to treat the contract as broken or as continued in force (appellant's brief, page 25) is obviously not germane to the case at bar.

Under the contract in question, the Transfer Company was not only obliged to make monthly pay-

ments but also to furnish daily service to the Association; but when the Transfer Company became bankrupt, it was divested of its property, its horses, wagons and equipment were not available for the continuance of its business, its credit was destroyed, its agents and servants were discharged and it ceased to be a going concern. The filing of a petition in bankruptcy against the Transfer Company, in connection with the adjudication which followed, constituted a complete disablement of its ability to continue to perform its contract with the Association and operated as a material breach of the contract.

II.

THE ASSOCIATION'S CLAIM FOR DAMAGES FOR BREACH OF CONTRACT CONSTITUTES A PROVABLE DEBT UNDER THE BANKRUPTCY ACT.

Section 63 a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 St. 562; U. S. Comp. St. 1901, page 3447) provides:

> "Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract expressed or implied."

Section 63 b provides:

> "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

If, therefore, the bankruptcy of the Transfer Company operated as a breach of the contract between that corporation and the Association, a right of ac-

tion for the resulting damages immediately arose against the Transfer Company, and, by the above quoted sections of the act, a claim for such damages is provable against the estate of the bankrupt Transfer Company.

Although a debt to be provable must be in existence on the day on which the petition for adjudication was filed (*Zavelo* v. *Reeves*, 227 U. S. 625, 631) it would be "an unnecessary and false nicety to hold that, because this act was the filing of the petition in bankruptcy, therefore there was no breach at the time of filing the petition." (Judge Lowell in *Ex parte Pollard*, 2 Lowell 411, holding a similar claim a provable debt.) The cases above cited, holding that bankruptcy constitutes a breach of contract, decide also that a claim for damages for the breach of the contract constitutes a provable debt.

In re Swift, supra. This was the case of an executory contract for the purchase of stock from the bankrupt. On page 321, the Court of Appeals for the First Circuit said:

> "The contract ripened simultaneously with the beginning of the proceedings in bankruptcy, as the consequence thereof in connection with the adjudication which followed. Of course, as everything related back to the filing of the petition, the ripening of the claim did not occur before it was filed, nor afterwards, but simultaneously with it, as already stated. Consequently, by necessary effect, there was created and existed, when proceedings commenced, a provable claim. Whether Dee had the option of withholding his claim and ripening it by a demand subsequently—a matter to which we have already referred—he waived that option by his proof of debt, and he thus elected, as he had a right to do, to assume that demand and tender had

been rendered unnecessary, and to liquidate his claim accordingly, subject to the right of election on the part of the trustee to rehabilitate the contract which we have already referred to, but which is of no importance in this case, as no such right was exercised."

In re Pettingill and Company, supra. In a frequently cited and able opinion, Judge Lowell says (page 146):

"For admission to proof, however, the claim need not arise before bankruptcy, nor need his contract be broken theretofore. It is sufficient for proof if the breach of contract and bankruptcy are coincident. * * * If the trustee desires to keep the contract alive, he must manifest his election within a reasonable time. Where he does not do this, and where the creditor, by seeking to prove, manifests his election to treat the contract as broken, the court of bankruptcy may permit proof of claims arising from a breach of contract, which breach did not occur before bankruptcy, but was caused constructively by the adjudication of bankruptcy itself." (Citing *Ex parte Swift*, and *Ex parte Pollard.*)

"It seems, therefore, that the test of provability under the Act of 1898 may be stated thus: if the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under Section 63b."

In re Neff, supra. The late Justice Lurton when sitting as a Circuit Judge of the Sixth Circuit, re-

ferred to the *Swift* and *Pettingill Company* cases with approval, and said of the provability of a claim against an involuntary bankrupt on a written agreement to repurchase stock subsequent to the time of filing the petition.

> "It is sufficient that a claim becomes provable as a consequence of bankruptcy. The right to sue for and recover damages then accrues." (page 61.)

In re Duquesne Incandescent Light Co., supra. The court said of a claim for damages under a contract by the bankrupt to pay for goods as manufactured:

> "The only question that remains is whether the claimant is entitled to recover these damages against the bankrupt; the breach having been occasioned by the filing of the petition in bankruptcy. We are of the opinion that he is."
>
> "The claim under consideration was founded upon an express contract in writing, damages for the breach of which were unliquidated. The claim was therefore a provable claim, and under Section 63b could be liquidated upon application to the court in such manner as it should direct." (Page 791.)

See to the same effect:

In re Dr. Vorhees Awning Hood Co., supra.
Ex parte Pollard, supra.

It is important to note that courts of equity, which, as pointed out above, hold that the appointment of a receiver for a corporation constitutes a breach of the corporation's contracts, allow a claim for the damages resulting from such a breach to be enforced against the assets of the corporation in the possession of the receiver. (*Penn. Steel Co.* v. *N. Y.*

City Ry., 198 F. 721, 743, 746.) In that case the Court of Appeals for the Second Circuit cited the bankruptcy cases, above referred to, with approval, and as sustaining the principal case.

In a recent case (*Lesser* v. *Gray*, 236 U. S. 470), this court has expressed its views in favor of the provability of appellee's claim for damages. The facts stated in the case show that Lesser filed a claim for breach of contract caused by bankruptcy against the bankrupt's estate, which was disallowed as without foundation. Lesser sued one of the partners of the bankrupt co-partnership thereafter in the state court and a demurrer to this petition was sustained. A writ of error was sued out to this court, which affirmed the decision of the lower court. After a discussion of the prior proceedings the opinion of the court by Mr. Justice McReynolds is as follows:

> "The petition in the cause now under review was properly dismissed. If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding no legal injury resulted. *If, on the other hand, that view of the law was erroneous, then there was a breach and defendant Gray became liable for any resulting damage; but he was released therefrom by his discharge.* In this state of the record we will not enter upon a consideration of the specific reason assigned by the state court for sustaining the demurrer. No effort was made by plaintiff in error to secure a review of the action of the bankruptcy court in the direct way prescribed by the statute and that result may not be obtained indirectly through the present proceeding. The judgment of the court below is affirmed." (Italics author's.)

In other words, the court said that the filing of an

involuntary petition in bankruptcy constitutes a breach of the bankrupt's executory contracts, giving rise to a provable claim for damages; which claim when presented may be disallowed. The referee in the present case held that the Association did not have a provable claim (Rec., 9) and, therefore, refused appellee the right to liquidate its damages. No valid distinction can be made between Lessers' contract to deliver 500 bales of patches a month to the bankrupt and the Association's contract to give the Transfer Company daily access to the guests and patrons of the hotel and their baggage. The contracts are both executory and a breach thereof gives rise to the same measure of damages.

If an executory contract is broken prior to the bankruptcy, this court has held that a claim for the resulting damages is provable. *Grant Shoe Co.* v. *Laird*, 212 U. S. 445. If a partially executed contract is broken by the bankruptcy, for example, a contract for the sale of goods when the bankrupt had received the goods but payment therefor was not due at the time of filing the petition, there can be no doubt but that the creditor would have a provable claim. Therefore, when an executory contract is broken by the bankruptcy a claim for the resulting damages should be provable.

III.

THE ASSOCIATION'S CLAIM IS NOT CONTINGENT.

The argument that appellees claim is contingent and therefore not provable was rejected by the Circuit Court of Appeals (except as to the point raised

by the cross appeal to be hereinafter discussed (pages 21-23)). But in similar cases it has been discussed by other lower Federal Courts and it is again presented in appellant's brief (pages 52-60). *F. L. Grant Shoe Co.* v. *Laird,* 212 U. S. 445, appears to have finally disposed of the question. The court therein decided that if a breach of contract occurs prior to bankruptcy, the fact that the damages are unliquidated does not render the claim contingent, and the claim therefore constitutes a provable debt. It necessarily follows from this decision that when the breach of an executory contract is the bankruptcy of the obligor the fact that the damages are unliquidated does not render the resulting claim contingent. As has been well said, "the contract ripened simultaneously with the beginning of the proceedings in bankruptcy, as a consequence thereof, in connection with the adjudication which follows," (*In re Swift, supra*), and this does not differentiate the present case from one where the breach occurs prior to bankruptcy, so far as the contingency of the claim for damages is concerned.

Dunbar v. *Dunbar,* 190 U. S. 340, is cited as an authority against the provability of appellee's claim. The contract under consideration in that case provided for the payment of a fixed sum per annum to a divorced wife as long as she remained unmarried. The only contingency was in the duration of the payments, and the court held that it would have been impossible for the bankruptcy court to compute the damages, since there was no basis for estimating the time during which the wife would have remained unmarried, and that therefore a claim on the breach of such a contract was contingent and would not have

been a provable debt against the bankrupt husband. The opinion of the court suggests that if the payments had not been conditioned upon the wife's remarriage, but only on her life, so that damages could be computed by mortality tables, the claim would have been provable as an unliquidated claim. This intimation of the court's approval of the doctrine of the provability of claims for the breach of executory contracts is strengthened by their citation with evident approval of *Cobb* v. *Overman*, 109 Fed. 65 (1901), where the Circuit Court of Appeals for the Fourth Circuit, relying on Section 63a (1) of the present act, allowed a claim against a bankrupt's estate founded upon a penal bond to secure payment of a life annuity. The material breach of the annuity was caused by the bankruptcy. The objection to the claim in the *Dunbar* case, therefore, was not the fact that it would have been necessary to assess present damages for payments to be made in the future, but that it was impossible to compute the amount of such damages; nor was there evidently any objection to the provability of the claim because the bankruptcy caused the breach. There is no contingency or uncertainty in the contract set forth in this record which renders it impossible or even difficult for a court to compute the damages claimed by appellant.

The option of a trustee in bankruptcy to perform a contract cannot affect the provability of a claim for damages if the option is not exercised. The non-acceptance of the contract by the trustee relates back to the time of filing of the petition; as does the adjudication and many similar steps in the administration of the estate. The contingency created

by the trustee's option to accept the contract is not because of the terms of the contract, but is created by the Bankruptcy Act, to assist in the proper administration of estates. If the existence of the trustee's option prevents provability of claims for damages upon executory contracts, it would result that the bankrupt estate would benefit from the adoption of beneficial contracts by the trustee, but would escape liability on all detrimental and, therefore rejected, contracts.

IV.

THE DECISIONS OF THE LOWER FEDERAL COURTS HOLDING THAT A CLAIM AGAINST A BANKRUPT ESTATE FOR DAMAGES OR ACCRUED RENT UNDER A LEASE DO NOT APPLY TO A CLAIM FOR DAMAGES UNDER AN EXECUTORY CONTRACT.

The common law has never allowed the lessor to recover from his lessee, because of a default by the lessee, rent to accrue in the future or to immediately liquidate the resulting damages under the lease; "and so note a diversity betweene duties which touch the realty and the meere personalty" (Co. Litt., 292b, Section 513.)

As was said by the Circuit Court of Appeals for the Second Circuit:

> "Rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is the consideration for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time stipulated for the payment arrives." (*In re Roth and Appel*, 181 Fed. 667, 669.)

Or, as stated in *Watson* v. *Merrill*, 136 Fed. 359, 361; (Circuit Ct. App. 8th Cir.)

> "In *Deane* v. *Caldwell*, 127 Mass. 242, 244, Chief Justice Gray (Subsequently Mr. Justice Gray of the Supreme Court) announces the true rule upon this subject in these words: 'Before the day at which rent is covenanted to be paid, it is no sense a debt, it is neither *debitum* nor *solvendum* form if the lessee is evicted before that day, it never becomes payable. *Bordman* v. *Osborn*, 23 Pick. 295. It is not within the provision of a bankrupt act allowing uncertain or contingent demands to be proved against the estate of a bankrupt, because it is not an existing demand, the cause of action on which depends upon a contingency, but the very existence of the demand depends upon a contingency.' "

In *Slocum* v. *Soliday*, 183 Fed. 410, 411, the court said, speaking of a claim in bankruptcy on a covenant to pay rent:

> "The rule that rent, as such arises out of the occupation of the leased premises, or, as in support therefor, the rule that there is no certain liability because *non constat* the tenant may not continue to occupy the premises, are too well established to require any discussion by us so far as this case is concerned."

Furthermore, Judge Putnam, in his opinion in the *Slocum* case, refers to and approves the case *In re Swift*, formerly decided by the same court, which held provable a claim on the breach of an executory contract. The *Swift and Pettingill* cases are referred to with approval in *In re Roth and Appel* (page 671); and the former of these cases is referred to with approval in *Watson* v. *Merrill* (page 364). The distinction between the rent cases, and the cases cited in this brief on behalf of the claim of the Association has been fully recognized.

Whatever position this court may take when a case

involving a claim for unaccrued rent or damages under a lease is presented for decision, it is evident that the technical rule based on feudal conceptions of a chattel real and the nature of rent (which has been regenerated by the above cited cases) should not be applied to the contract here in question. To do this would require its application to all executory contracts and nullify the now well established doctrine by which one party to a contract is given an immediate right of action upon an anticipatory or after a material breach by the other party.

V.

THE OPTION OF THE ASSOCIATION TO CANCEL THIS CONTRACT UPON SIX MONTHS NOTICE DOES NOT RENDER ITS CLAIM FOR DAMAGES CONTINGENT BEYOND SUCH PERIOD.

The contract provides:

> "The party of the first part [your petitioner], however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so canceled and revoked." (Rec., 5.)

The Circuit Court of Appeals said as to the effect of the above provision of the contract:

> "Under this provision the contract is mutually obligatory for a term of six months only, and uncertain and without force for any longer term of service *in futuro*, within *Dunbar* v. *Dunbar, supra*, and authorities cited. Thus no damages for breach are provable beyond such period." (Rec., 28.)

In this, we apprehend the court was in error. The contract under consideration in *Dunbar* v. *Dunbar, supra*, provided for the payment of a fixed sum per annum to a divorced wife as long as she remained unmarried, and the court held that a claim against a bankrupt estate on the contract would not have constituted a provable debt because the claim was contingent.

It is to be noted that the liability of the Transfer Company, in the case at bar, was absolute; there was no condition precedent to its obligation to pay the specified sums and render the stipulated services, nor were there provisions in the contract by which the obligations of the defendant were, *ipso facto*, to cease upon the happening of any event.

In the *Dunbar* case by the contract itself the duration of the liability of the bankrupt was uncertain, and the condition which might terminate the liability was a part of the bankrupt's promise. In the case at bar, by the contract itself, the duration of the liability of the bankrupt is fixed and definite, and the option of recision is an entirely separate privilege granted to the claimant for its benefit.

We believe it would not be disputed, that the option clause was inserted in the contract solely for

the benefit of the Association. It cannot with propriety therefore be construed to cut off or diminish any right or rights which the Association would have had without it. To construe this clause so as to cut off the right of the Association to prove damages beyond the period of six months would be to deprive it of an existing common law right. It would be to turn what was intended as a weapon for its defense into an instrument for its destruction. To so construe it would allow the Transfer Company to take advantage of its own wrong, for it could render unsatisfactory service and then meet the claim for damages by the absurd argument that the option might yet be exercised, and limit the damages recoverable against it to such as might be suffered within a period of six months. It would in effect give the Transfer Company an option to cancel the contract upon six months' notice in case its own performance should be unsatisfactory.

There can be no serious question but that the lower court erred in holding that the Associations claim was contingent after a period of six months. Whether, as would appear, the error arose from a misconception of the scope of the *Dunbar* case (which involves a construction of the Bankruptcy Act), or, as opposing counsel suggest, from the application of a proposition of general law (which is unsupported by any authority), this court should by a reversal prevent the growth of a doctrine which is unjust, unequitable, and dangerous in its possible future application.

VI.

THE GENERAL POLICY OF THE BANKRUPTCY ACT FAVORS THE PROVABILITY OF THE ASSOCIATION'S CLAIM.

This court has recently said:

> "It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh, free from the obligations and responsibilities consequent upon business misfortunes. And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent."
>
> "Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contracts, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation." *Williams v. U. S. Fidelity Co.*, 236 U. S. 549, 554, 556.

When an executory contract is broken by the filing of a petition in bankruptcy and the subsequent proceedings thereon, if the court does not allow the claim for the resulting damages to be proved against the bankrupt's estate, it necessarily follows that the cause of action for breach of contract is not barred by the bankrupt's discharge, and may be subsequently enforced against him. This would result in a hardship to the bankrupt debtor for it prevents him from starting afresh, freed from his contractual obligations. It is also unfair to the creditor, who has suffered an immediate financial loss by the breach of an advantageous contract, not to be allowed to enforce his claim for damages against the estate of the bankrupt, and not to be allowed the other rights

afforded to a creditor by the provisions of the Bankruptcy Act, such as the rights to accept or reject a composition, or to examine the bankrupt.

We respectfully submit that the entire claim of the Association constitutes a provable debt under the provisions of the Bankruptcy Act, and that the judgment and order of the Circuit Court of Appeals, disallowing the claim for damages after a period of six months, should be reversed and the cause remanded for the liquidation of the entire claim of the Association.

RUDOLPH MATZ,
WILLIAM D. BANGS,
JOHN C. MECHEM,
Counsel for Chicago Auditorium Association, Appellee and Cross Appellant.

Chicago, Illinois, December 15, 1915.

No. [redacted] 174

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1914.

CHICAGO AUDITORIUM ASSOCIATION,
Petitioner,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Respondent.

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

PETITION, MOTION, STIPULATION.

MR. RUDOLPH MATZ,
MR. WILLIAM D. BANGS,
COUNSEL FOR PETITIONER.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1914.

THE PETITION OF CHICAGO AUDITORIUM ASSOCIATION FOR A WRIT OF CERTIORARI, DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, TO BRING BEFORE THE SUPREME COURT THE CASE ENTITLED:

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION,
Appellee,

against

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Appellant.

HEARD IN THE CIRCUIT COURT OF APPEALS BEFORE BAKER, SEAMAN AND MACK, CIRCUIT JUDGES, ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, LANDIS, DISTRICT JUDGE PRESIDING.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Chicago Auditorium Association, respectfully shows to this court as follows:

(1) Your petitioner and the Frank E. Scott Transfer Company (hereinafter referred to as the Transfer Company) entered into a written contract on February 1, 1911, by the terms of which your petitioner granted the Transfer Company the exclusive baggage and livery privilege of the Auditorium

Hotel in the City of Chicago, for a period of five years from the date of the contract. This exclusive privilege was stated in the contract to consist of the sole and exclusive right, so far as it was within the legal capacity of your petitioner to grant, to transfer and carry to and from the said hotel all articles of baggage, and all passengers and persons, and to furnish livery to the guests and patrons of the hotel. In consideration of this grant, the Transfer Company agreed to furnish prompt and efficient livery and baggage service at reasonable rates during the continuance of the contract, and to pay your petitioner a total sum of $6,000 for the baggage privilege and $15,000 for the livery privilege, a total of $21,000, payable in monthly installments.

The contract further provides:

> "The party of the first part [your petitioner], however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so canceled and revoked." (Rec., 5.)

(2) The contract was carried out by both parties thereto until July 22, 1911, when an involuntary petition in bankruptcy was filed against the Transfer Company ~~became bankrupt~~ and it ceased to perform the contract.

(3) Your petitioner filed a claim against the bankrupt estate for the amount due prior to bankruptcy proceedings (which amount was undisputed and allowed) and for damages resulting from the breach of the contract. The referee disallowed the claim for damages (Rec., 9) and the District Court sustained the referee. (Rec., 13.) The Circuit Court of Appeals for the Seventh Circuit reversed the order of the District Court and directed the lower court to allow $691.81 as damages, and to disallow the remaining portion of the claim. (Rec., 32.) The amount allowed represents the damages for a six months' period after the breach, arbitrarily liquidated in your petitioner's proof of debt and accepted as correct by the respondent. The damages so liquidated for the full term of the contract amounted to $6,226.74. (Rec., 7.)

(4) The Circuit Court of Appeals found the facts to be as above stated (Rec., 31-32) and filed conclusions of law thereon as follows:

> "1. That the intervention of bankruptcy, as recited, constituted anticipatory breach of the contract in suit for which damages are provable in bankruptcy.
>
> 2. That the option reserved in favor of the appellant to cancel and revoke the privileges so granted by giving six months' notice in writing of its election so to do, limits the amount recoverable for such breach to such period of six months.
>
> 3. That the appellant is entitled to allowance of $691.86 upon the claim in controversy, but its claim in excess thereof was rightly disallowed." (Rec., 32.)

(5) The decision of the Circuit Court of Appeals contains only the following brief statement of the

reasons for limiting your petitioner's damages to the six months' period.

> "It appears from the contract, however, as exhibited with the claim, that it reserves in favor of the appellant an option 'to cancel and revoke either or both of said privileges' granted by the contract 'by giving six months' notice in writing of its election so to do,' and that both parties shall 'in that case be released from further liability' at the expiration of the six months. Under this provision the contract is mutually obligatory for a term of six months only, and uncertain and without force for any longer term of service *in futuro*, within *Dunbar* v. *Dunbar*, *supra*, and authorities cited. Thus no damages for breach are provable beyond such period." (Rec., 28.)

(6) The respondent has perfected an appeal to this court, on the ground that the Circuit Court of Appeals erred in allowing any portion of your petitioner's claim; and your petitioner has perfected a cross-appeal on the ground that the Circuit Court of Appeals erred in not directing the District Court to allow the entire sum when properly liquidated.

Your petitioner, feeling itself aggrieved by the order of the Circuit Court of Appeals, directing the District Court to disallow the claim of your petitioner, except for a period of six months, prays this Honorable Court for a writ of *certiorari* and respectfully submits that this is a proper case for the granting of said writ for the following general reasons:

I.

THE CIRCUIT COURT OF APPEALS DECIDED THE CASE ON THE AUTHORITY OF A PREVIOUS DECISION OF THIS COURT, WHICH DECISION IS CLEARLY DISTINGUISHABLE.

The only case referred to in Judge Seaman's opinion is *Dunbar* v. *Dunbar*, 190 U. S. 340. In that case the defendant had contracted to pay his divorced wife a specific sum of money per month as long as she remained unmarried, and upon his being adjudged bankrupt, she presented a claim under this agreement against his estate. The sole question before the court was whether her claim as a whole was contingent in the sense that it was not provable under the Bankruptcy Act. The court held that since the duration of the liability could not possibly be determined, and there was no standard of damages by which the breach could be measured, the claim was contingent and could not be proved under the Bankruptcy Act. The case, therefore, decides a question involving the construction of the Bankruptcy Act, viz: the provability of contingent claims. But on the question of damages here presented, viz: the proper measure of damages for the breach of the contract in question, the case has no bearing whatsoever. The cases are alike only in this respect: that in both of them there is an existing liability which may be terminated by the happening of a more or less contingent event—but this is as far as the similarity extends. In the Dunbar case the duration of the liability of the bankrupt was uncertain; in the case at bar, the duration of the liability of the bankrupt is fixed and definite. In the Dunbar case,

the very event which may terminate the liability is itself, a condition of the liability; in the case at bar the event which may terminate the liability is an entirely separate privilege granted to your petitioner for its benefit. In the Dunbar case the court held that there was no possible measure of damages for the breach of a contract such as was there under consideration; in the case at bar, there are two possible measures of damages, and the only question is which of them is the proper one.

It is submitted that *Dunbar* v. *Dunbar* decides only a bankruptcy question and is no authority for the decision of the lower court.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH A PREVIOUS DECISION OF THIS COURT.

The lower court says "the contract is mutually obligatory for a term of six months only, etc." To test this statement let us assume that the situation had been reversed. Suppose that your petitioner had wilfully repudiated the contract, and the Transfer Company had thereupon immediately brought suit for damages. Could your petitioner set up in defense that since it could upon the happening of either of two contingencies terminate the contract upon six months' notice, the Transfer Company could not recover damages beyond that point? Clearly not, as was decided in *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 547. If the option inserted in the contract for your petitioner's benefit would

not have been a defense to your petitioner, if it had been sued for a breach of contract, it cannot be a defense to the respondent in the present case. Therefore, the above statement of the Circuit Court of Appeals, which is the sole basis of its decision, is manifestly *contra* to a decision of this court.

III.

THE DECISION IS CONTRARY TO THE PROPER RULE OF DAMAGES PREVIOUSLY LAID DOWN BY THIS COURT.

The case of *Pierce* v. *Tennessee Coal, Iron and Railroad Company*, 173 U. S. 1, p. 16, contains the following statement of the proper rule of damages for breach of contract:

> "In so doing he [the plaintiff] would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract."

The "value of the contract" to your petitioner was not diminished by the fact that it contained an option of recision inserted for its benefit.

The rule stated in the above case has not only been the test always applied by this court (*United States* v. *Behan*, 110 U. S. 338, 344; *Hinckly* v. *Pittsburgh Steel Company*, 121 U. S. 264), but it is generally accepted as correct. Sedgwick on Damages, 9th Ed., Vol. II, Par. 609, p. 1183; Par. 636d, p. 1250.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS AT VARIANCE WITH THE GENERAL PRINCIPLES OF LAW AND THE INTERESTS OF JURISPRUDENCE REQUIRE THE SUPREME COURT'S DECISION THEREON.

The proposition of law held by the Circuit Court of Appeals may be stated in general terms as follows: If an option of recision upon certain contingencies is inserted in a contract for the benefit of one party thereto (for example, the vendor) the vendee in an action against him for a material breach of the contract can set up as a defense the existence of the vendor's option, although unexercised by the vendor at the time of the breach; and thus limit the vendor's damages to the period, if any, of notice required for the exercise of the option. If the contract provided that the option should become effective immediately upon notice, it would necessarily follow that no damages whatever could be recovered upon a material breach, although the contract had been materially breached by the vendee and the vendor had not exercised an option inserted in the contract solely for his benefit.

The decision of the lower court, thus stated as a proposition of general law, is an absurdity. It would allow a provision of the contract which was inserted solely for the benefit of one party, to be seized upon by the other party as a defense to his material breach. (Compare *Anvil Mining Company* v. *Humble, supra,* II.)

The court must have had in mind, as shown by its citation of *Dunbar* v. *Dunbar, supra,* that the dam-

ages claimed were not provable in bankruptcy, apart from any question of the law of damages for breach of contract. If the Circuit Court of Appeals decided this case as a proposition of general law, not involving the construction of the Bankruptcy Act, it is submitted that there is no decided case in this country which supports directly or indirectly the decision of the Circuit Court of Appeals on the above question of damages, and we challenge counsel for the respondent to produce any authority or sound argument to sustain the lower court.

The fallacious theory of the court below would prevent the recovery of adequate damages for the breach of the numerous contracts which contain options of recession. (For example, *Philadelphia Ball Club* v. *Lajoie*, 202 Pa. 210) and nullify, in such contracts, the doctrine of anticipatory breach. (*Roehm* v. *Horst*, 178 U. S. 1.) This court should prevent the growth in the lower federal courts of such a vicious doctrine in the law of damages.

V.

THE PRESENT PETITION IS IN THE NATURE OF A CROSS-WRIT.

The case is already before the court upon the respondent's appeal and the court will be called upon, therefore, to give full consideration to the terms of the contract herein involved. For this reason it would appear that a petition by the appellee requesting the court to review alleged errors of the lower court on the question of damages, should receive favorable consideration.

Wherefore your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Seventh Circuit, to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

CHICAGO AUDITORIUM ASSOCIATION.
By RUDOLPH MATZ,
WILLIAM D. BANGS,
Counsel for Petitioner.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

William D. Bangs, being first duly sworn, on oath deposes and says, that he is one of the counsel for the Chicago Auditorium Association, the petitioner in the above entitled cause; that he prepared the foregoing petition; and that the allegations thereof are true as he verily believes.

WILLIAM D. BANGS.

Subscribed and sworn to before me this 26th day of April, A. D. 1915.

I. M. LANGWORTHY,
(Seal) *Notary Public.*

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1914.

No. 521.

Chicago Auditorium Association,
Appellant,
vs.
Central Trust Company of Illinois, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt.

No. .....

Chicago Auditorium Association,
Petitioner,
vs.
Central Trust Company of Illinois, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt,
Respondent.

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED, between the parties to the above entitled causes, by their respective counsel, that the petition of the Chicago Auditorium Association for a writ of *certiorari*, and the motion of Central Trust Company of Illinois, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt, to dismiss the cross appeal of said Chicago Auditorium Association, shall be submitted to the court, on the 17th day of May, A. D. 1915, and for this purpose said parties and each of them hereby waive service of notice of the submis-

sion of said petition and motion as prescribed by rule of court, and all other requirements with reference thereto, in any rule of court contained.

CENTRAL TRUST COMPANY OF ILLINOIS,
TRUSTEE OF THE ESTATE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT,
By EDWIN C. BRANDENBURG,
FREDERICK D. SILBER,
CLARENCE J. SILBER,
Its Counsel.

CHICAGO AUDITORIUM ASSOCIATION,
By RUDOLPH MATZ,
WILLIAM D. BANGS,
Its Counsel.

Dated, at Chicago, Illinois, this 26th day of April, A. D. 1915.

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA.

October Term, A. D. 1914.

Chicago Auditorium Association,
Petitioner,
vs.
Central Trust Company of Illinois, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt,
Respondent.

Now comes the Chicago Auditorium Association, by Rudolph Matz and William D. Bangs, its counsel, by Seth Shepard, Jr., attorney in their behalf, and moves this court, upon a certified copy of the transcript of the record herein hitherto filed in this court, and upon the annexed petition for a writ of *certiorari* directed to the Circuit Court of Appeals for the Seventh Circuit, and to the District Court of the United States for the Northern District of Illinois, Eastern Division, to bring before this Honorable Court the case entitled, *In the Matter of Frank E. Scott Transfer Company, Chicago Auditorium Association, Appellant,* v. *Central Trust Company of Illinois, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt, Appellee,* decided by the said Circuit Court of Appeals on the 20th day of April, A. D. 1914, upon appeal from the said District Court, for such proceedings therein, as to this court

may seem just; and for such other and further relief in the premises as may seem just.

RUDOLPH MATZ,
WILLIAM D. BANGS,
Counsel for Chicago Auditorium Association.

BY SETH SHEPARD, JR.,
Attorney in Their Behalf.

/ 0

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1914.

No. 521.

CHICAGO AUDITORIUM ASSOCIATION,
Appellant-Petitioner,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Appellee-Respondent.

MOTION, STIPULATION WAIVING NOTICE, AND BRIEF ON BEHALF OF APPELLEE, IN SUPPORT OF ITS MOTION TO DISMISS THE CROSS-APPEAL OF APPELLANT, AND IN OPPOSITION TO THE ISSUANCE OF THE WRIT OF CERTIORARI.

EDWIN C. BRANDENBURG,
FREDERICK D. SILBER,
CLARENCE J. SILBER,
Counsel for Appellee.

Geo. Hornstein Co., Printer, Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 521.

CHICAGO AUDITORIUM ASSOCIATION,
Appellant-Petitioner,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Appellee-Respondent.

MOTION, STIPULATION WAIVING NOTICE, AND BRIEF ON BEHALF OF APPELLEE, IN SUPPORT OF ITS MOTION TO DISMISS THE CROSS-APPEAL OF APPELLANT, AND IN OPPOSITION TO THE ISSUANCE OF THE WRIT OF CERTIORARI.

MOTION.

Comes now the appellee herein, by EDWIN C. BRANDENBURG, FREDERICK D. SILBER and CLARENCE J. SILBER, its counsel, and moves this Honorable Court for the entry of an order, dismissing the cross-appeal of CHICAGO AUDITORIUM ASSOCIATION, appellant, allowed by the United States Circuit Court of

Appeals, for the Seventh Circuit, on May 18, A. D. 1914, and in support of its said motion, as well as in opposition to appellant's petition for certiorari, tenders herewith its brief. A printed transcript of record on the original appeal of appellee is now on file in the office of the Clerk of this Court, in cause No. 500, entitled, "CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE OF THE ESTATE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT, APPELLANT, vs. CHICAGO AUDITORIUM ASSOCIATION," and in case No. 521, entitled as above.

Respectfully submitted.

EDWIN C. BRANDENBURG,
FREDERICK D. SILBER,
CLARENCE J. SILBER,
Counsel for Appellee.

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED, between the parties to the above entitled causes, by their respective counsel, that the petition of the CHICAGO AUDITORIUM ASSOCIATION, for a writ of certiorari and the motion of CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the estate of FRANK E. SCOTT TRANSFER COMPANY, bankrupt, to dismiss the cross-appeal of said CHICAGO AUDITORIUM ASSOCIATION, shall be submitted to the Court on the 17th day of May, A. D. 1915, and for this purpose said parties and each of them hereby waive service of notice of the submission of said petition and motion, as prescribed by rule of court and all other requirements with reference thereto, in any rule of court contained.

CENTRAL TRUST COMPANY OF ILLINOIS,
TRUSTEE OF THE ESTATE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT,

By EDWIN C. BRANDENBURG,
FREDERICK D. SILBER,
CLARENCE J. SILBER,
Its Counsel.

CHICAGO AUDITORIUM ASSOCIATION,
By RUDOLPH MATZ,
WILLIAM D. BANGS,
Its Counsel.

Dated at Chicago, Illinois, this 26th day of April, A. D. 1915.

BRIEF IN SUPPORT OF APPELLEE'S MOTION TO DISMISS CROSS-APPEAL, AND IN OPPOSITION TO THE ISSUANCE OF THE WRIT OF CERTIORARI.

By stipulation of the parties, as appears herein, the petition of Chicago Auditorium Association, for a writ of certiorari, is submitted to the Court concurrently with appellee's motion to dismiss the cross-appeal allowed to the Chicago Auditorium Association by the Court below. The facts set forth in the petition for certiorari are in large part sufficient for the purposes of this motion.

It may be well, however, to invite the Court's attention to a somewhat more detailed analysis of the contract between the parties, on which appellant bases its claim for damages against the bankrupt estate. This contract, entered into on February 1, A. D. 1911, grants to the bankrupt, Frank E. Scott Transfer Company, for the period of five years, certain concessions therein designated as baggage and livery privileges. These privileges or concessions consist of the exclusive right (so far as it is within the legal capacity of the Chicago Auditorium Association to grant the same) to transfer and carry to and from the Auditorium Hotel in the City of Chicago baggage of its guests and patrons, and likewise to transfer and carry passengers and persons to and from said hotel and to furnish livery to said parties named. In consideration for such concessions, the Transfer Company obligates itself to pay

for the baggage privilege the gross sum of six thousand dollars, in monthly installments of one hundred dollars each, in advance, on the first day of each and every month during the term of said concession, and to furnish prompt and efficient baggage service at reasonable rates *during the continuance of such concession.*

Further, the Transfer Company binds itself for the payment of fifteen thousand dollars for the livery privilege, in monthly installments of $250 each, payable in advance on the first day of each and every month during the continuance of the concession, and agrees to furnish, *during the continuance of said concession,* prompt and efficient service at reasonable rates. The option reserved in favor of the appellant, to terminate the contract under certain conditions, is fully set forth in appellant's petition for certiorari herein submitted.

As appears by reference to the opening sentence of the opinion of the Circuit Court of Appeals (Rec., 26):

> "The single question for review on this appeal is, whether the claim for damages, predicated on an alleged anticipatory breach of the executory contract in suit, constitutes a provable claim in bankruptcy."

The Court below answered this question in the affirmative, admitting to proof and allowance appellant's claim for damages, but limiting the period of its provability to six months after bankruptcy, because of the option reserved by the contract in favor of the appellant.

By petition presented by appellee to his Honor,

Justice Van Devanter, for the allowance of an appeal, such appeal was awarded on May 13, 1914. (Rec., 36-37.) Review by this court was sought for the purpose of obtaining an authoritative adjudication upon the question stated by the Court of Appeals as set forth. The only purpose of praying the issuance of a writ of certiorari by appellant is to assign cross-error on the ruling of the Court of Appeals as to the measure of its damages sustained.

Authority for the allowance of an appeal in bankruptcy, in the absence of the certificate herein awarded, is found in Section 25b, paragraph 1, of the existing Bankruptcy Act, as follows:

> "From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:
>
> "1—Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States."

While the jurisdictional amount would appear to be present, in the denial of appellant's claim for damages, it is submitted that no Federal question is involved and that a determination of the case by the Circuit Court of Appeals, resulted from the consideration, in this particular, of questions of general law. Under these circumstances, it is ruled by the decisions of this Court that appeal does not lie.

Chapman, Trustee, v. *Bowen,* 207 U. S., 89.

Corbett v. *Craven (Kenney* v. *Craven)*, 215 U. S., 125.

Blake, Trustee, v. *Openhym,* 216 U. S., 322.

In the *Chapman* case, in sustaining a motion to dismiss an appeal allowed by a Judge of the Circuit Court of Appeals, for the Seventh Circuit, this court says (page 92):

> "As to paragraph 2 (referring to Section 25b, of the Bankruptcy Act), there was no such certificate here; and as to paragraph 1, we are not able to perceive that a writ of error from the highest court of a State to this court could be maintained. No validity of a treaty or statute of, or an authority exercised under, the United States was drawn in question; nor the validity of a statute of, or an authority exercised under, any State, on the ground of repugnancy to the Constitution, treaties or laws of the United States; nor was any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and decided against. The decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the Bankruptcy Act."

In their petition for certiorari, counsel quote the pertinent portion of the opinion of the Court of Appeals, dealing with the option provision, contained in the contract here involved. Reference is made to the Court's statement that:

> "Under this provision the contract is mutually obligatory for a term of six months only, and uncertain and without force for any longer term of service *in futuro*, within *Dunbar* v. *Dunbar*,

> *supra*, and authorities cited. Thus no damages for breach are provable beyond such period." (Rec., 29.)

Examination of the case cited, discloses that suit was commenced in a local court, at Boston, to recover moneys alleged to be due on a contract, whereby the defendant to the action obligated himself to make certain payments for the support of the plaintiff, and for the education of their children. The defendant pleaded his discharge in bankruptcy as a bar, which the Supreme Judicial Court of Massachusetts held was not good. Thereupon error proceedings were instituted in this Court, for the purpose of reviewing the judgment of the Massachusetts Court, pursuant to Section 709, of the Revised Statutes of the United States, re-enacted as Section 237 of the present Judicial Code. By reason of the right invoked under the Bankruptcy Act, namely, the defendant's discharge in bankruptcy, and its denial, it became necessary, and this Court examined into the provability of the plaintiff's claim against the defendant's estate in bankruptcy, and ruled that the claim was contingent in its character, and so uncertain of liquidation, as to defeat its provability. And so this Court said (page 351):

> "We think the contract, so far as it related to the payment to the wife during her life or widowhood, was not a contingent liability provable under the Act of 1898."

For the purpose of determining whether the plea of discharge was good, the issue as to provability of the claim became pertinent. But in the case at bar,

by the holding of the Court of Appeals, provability and allowance is concluded in favor of appellant's claim and the measure of its damages is alone sought to be reviewed by the cross-appeal or by certiorari. This, as the decisions hold, does not permit of an appeal.

New Jersey City & Bergen Railroad Co. v. *Morgan*, 160 U. S., 288.

State of Missouri v. *Andriano*, 138 U. S., 497.

Counsel urge that if the decision below was predicated upon principles of general law, the decree appealed from is necessarily erroneous. The authorities relied upon, in support of the argument, would seem to be inapplicable.

In *Anvil Mining Company* v. *Humble*, 153 U. S., 540, it was contended in an action to recover for breach of contract providing for the working of certain mines, that the contract authorized a termination at any time by the defendant, should it be determined that the system of mining then employed was prejudicial to the future welfare and development of the mine. As to this the Court says (page 547):

> "The first objection to any recovery under this claim is that by the very terms of the contract the defendant was at liberty to terminate it at any time, hence it is insisted that, even if it did so, plaintiffs were not entitled to recover any profits which they might have made, had it not been terminated; that coupled with the right to terminate was a special provision, to-wit: an award of referees for estimating the damages which the plaintiffs should sustain in consequence of such termination, and that no attempt

> to secure such an award was alleged or proved. To this it may be replied that the contract did not give to the defendant a right arbitrarily to terminate the contract, but only when it determined, that the caving system was 'prejudicial to the future welfare and development of the mine,' and that there is no pretense that it ever made such determination."

This case does not discuss or consider the effect of the option as depriving the contract of mutuality, nor the uncertainty of the damages proved, elements which were both present and considered by the Court of Appeals in the case at bar.

Again, in *Golden Cycle Mining Co.* v. *Rapson Coal Mining Co.*, 188 Fed., 179, it was ruled by the Court of Appeals for the Eighth Circuit, that under a contract to furnish to a mining company all the coal it should require in its business, during a stated time, which gave it the option in the event it should acquire a substantial interest in a coal mine, as owner, lessee, or stockholder, whereby it secured the control of the operation of said mine, to terminate the contract, by giving ninety days' written notice to entitle it to exercise such option, it must at the time of giving such notice, have acquired the interest stated in a coal mine, and the giving of the notice, without having previously acquired such interest, was ineffectual to terminate the contract. In its opinion, the Court says (pages 182-183):

> "In order to reverse the judgment below, counsel for plaintiff in error urge the proposition that the contract sued on is not enforcible, because the respective promises made by the parties constituting the only consideration support-

ing the same are not mutually binding, and that the contract is *nudum pactum*.

"We think the word 'use' in the language of the contract is equivalent to the words 'needed, required,' or 'consumed,' and brings the agreement of the parties within the rule enunciated by this court in the case of *Cold Blast Transportation Co.* v. *Kansas City Bolt & Nut Co.*, 114 Fed., 81; 52 C. C. A., 25; 57 L. R. A., 696. It is said in the case last cited that:

" 'An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer.' "

In the case at bar, it is to be noted that the Transfer Company (the bankrupt) was obligated in addition to paying to appellant the agreed compensation, to furnish livery and baggage service only during the continuance of these several concessions, making it optional with appellant to terminate the contract at any time, on giving six months' notice in writing, of its election so to do, whenever the service was not in its opinion satisfactory, or, in the event of any change in management of the Chicago Auditorium Hotel. As to whether the service furnished by the bankrupt was satisfactory, rested solely within the discretion of appellant, and was not subject to determination by any standard of reasonableness or otherwise.

McCarren v. *McNulty*, 73 Mass., 139.

Temby v. *Brunt Pottery Company*, 229 Ill., 540.

Kendall v. *West*, 196 Ill., 221.

Hence, although it is sought to charge the bankrupt estate with damages, on the theory that the bankrupt was bound under the contract for a period of five years, it was discretionary with appellant to terminate the contract and its liability thereon, at any time, on six months' notice, as the contract required. Nor was there any consideration to support this option privilege, as found by the court in the case of *Philadelphia Ball Club* v. *Lajoie,* 202 Pa. St. Rep., 210, relied on by counsel.

There it was sought by injunction, to prevent the defendant from breaching his contract of employment, to serve the plaintiff as a base-ball player, during a stipulated time, within which he was not to play for any other club. The contract gave the plaintiff an option to discharge the defendant, on ten days' notice, without a reciprocal right on the part of the defendant. In disregard of his contract, the defendant arranged to play for a rival organization. In reversing the decree of the lower court and directing the allowance of the injunction sought, the Court says (page 219):

> "The term 'mutuality,' or 'lack of mutuality,' does not always convey a clear and definite meaning. As was said in *Grove* v. *Hodges,* 55 Pa., 316: 'The legal principle that contracts must be mutual, * * * does not then, mean that in every case each party must have the same remedy for a breach by the other.' In the contract now before us the defendant agreed to furnish his skilled professional services to the plaintiff for a period which might be extended over three years by proper notice given before the close of each current year. Upon the other hand,

> the plaintiff retained the right to terminate the contract upon ten days' notice and the payment of salary for that time and the expenses of defendant in getting to his home. But the fact of this concession to the plaintiff is distinctly pointed out as part of the consideration for the large salary paid to the defendant, and is emphasized as such; and owing to the peculiar nature of the services demanded by the business, and the high degree of efficiency which must be maintained, the stipulation is not unreasonable."

This conclusion is, however, at variance with that reached by this court in *Rutland Marble Co.* v. *Ripley,* 10 Wall., 339. The contract there involved obligated one Barnes to quarry marble and deliver at the mill of one Ripley all the marble that the said Ripley might want to saw, manufacture and sell in good sound blocks of suitable size, etc. It was also stipulated that Ripley might abandon the contract at any time on giving one year's notice. The complainants subsequently became the owners of the property on which the quarry was located, and by reason of differences between the complainants and Ripley the latter caused an entry to be made upon the complainants' property, by virtue of a right asserted pursuant to his agreement with them. Thereupon a bill was filed by which it was sought to enjoin further unlawful interference with or occupation of the complainants' property. Answers were interposed to the bill and a cross-bill filed by Ripley praying for specific performance of the contract. The Circuit Court granted the injunction prayed for and decreed specific performance of the contract

as sought by the cross-bill, from which orders appeals were prosecuted by both parties. In reversing the decree for specific performance this Court says (page 359):

> "Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the Marble Company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. Fry, Spec. Perf., Sec. 286."

To the same effect is

Rust v. *Conrad*, 47 Mich., 449.
Brooklyn Base Ball Club v. *McGuire*, 116 Fed., 782.

As applied to actions at law:

Pennsylvania Co. v. *Dolan*, 6 Ind. App., 109.
Vogel v. *Pekoc*, 157 Ill., 339.

Nor does the decision of the Court of Appeals militate against the doctrine announced by this Court in *Pierce* v. *Tennessee Coal, Iron & Railroad Company*, 173 U. S., 1, wherein the court held that on discharge from a contract of employment the party

discharged might elect to treat the contract as absolutely and finally broken, and in an action recover the full value of the contract to him, at the time of the breach, including all that he would have received in the future as well as in the past, deducting any sum that he might have earned, or that he might thereafter earn; nor the doctrine of anticipatory breach as applied by this court, in the case of *Rochm* v. *Horst*, 178 U. S., 1. It would appear from the contention of counsel that the holding of the Court below "would prevent the recovery of adequate damages for the breach of the numerous contracts which contained options of recission, and nullify in such contracts the doctrine of anticipatory breach." But if, as ruled by the Court of Appeals in the instant case, the contract was not obligatory upon either of the parties for the period of more than six months following the bankruptcy of the Transfer Company, the doctrine contended for is not nullified, but simply inapplicable, beyond the period stated, to the existing facts.

The request for the issuance of the writ of certiorari carries with it an admission of the futility of the cross-appeal. If the Court had jurisdiction of the cross-appeal, certiorari would be unnecessary, for its purpose is to add nothing to the record not already there. The petition failing to present such a case as this Court has held justifies the granting of the writ of certiorari, we submit that the petition should be denied.

And inasmuch as the cross-appeal involves no question which might have been taken on appeal or

writ of error, from the highest court of a state to this Court, under the provisions of Section 252 of the Judicial Code the motion to dismiss the cross-appeal should be granted.

Respectfully submitted.

EDWIN C. BRANDENBURG,
FREDERICK D. SILBER,
CLARENCE J. SILBER,
Counsel for Central Trust Company of Illinois, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt.

No. 521.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1914.

CHICAGO AUDITORIUM ASSOCIATION,
Appellant,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Appellee.

Heard in the Circuit Court of Appeals before Baker, Seaman and Mack, Circuit Judges, on Appeal from the District Court of the United States, for the Northern District of Illinois, Eastern Division, Landis, District Judge Presiding.

Brief in Opposition to Motion to Dismiss.

MR. RUDOLPH MATZ,
MR. WILLIAM D. BANGS,
COUNSEL FOR APPELLANT.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1914.

In the Matter of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt.

CHICAGO AUDITORIUM ASSOCIATION.
Appellant,

vs.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of FRANK E. SCOTT TRANSFER COMPANY, Bankrupt,
Appellee.

Heard in the Circuit Court of Appeals before Baker, Seaman and Mack, Circuit Judges, on appeal from the District Court of the United States, for the Northern District of Illinois, Eastern Division, Landis, District Judge, Presiding.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

The appeal in the above entitled cause is a cross appeal in the case before this court entitled *Central Trust Company of Illinois, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt*, v. *Chicago Auditorium Association*, No. 500, October term, 1914.

The motion of the appellee to dismiss the cross appeal is based on the ground that no federal question is involved, as is required by Section 25b, paragraph 1, of the Bankruptcy Act. Since the appellant's claim in bankruptcy for damages beyond a period of six months was denied by the Circuit Court of Appeals as not constituting a provable debt, it is

obvious that a federal question is presented, unless the decision of the court below proceeded upon questions of general law without reference to the provisions of the Bankruptcy Act, under the rule stated in *Chapman, Trustee*, v. *Bowen*, 207 U. S. 89; *Corbett* v. *Craven*, 215 U. S. 125. The inquiry on the present motion, therefore, is to determine on what ground the Circuit Court of Appeals rested its decision. The pertinent portion of the lower court's opinion is as follows:

> "Under this provision the contract is mutually obligatory for a term of six months only, and uncertain and without force for any longer term of service *in futuro*, within *Dunbar* v. *Dunbar, supra*, and authorities cited. Thus no damages for breach are provable beyond such period." (Rec., 28.)

An examination of *Dunbar* v. *Dunbar*, 190 U. S. 340, and the authorities cited therein will disclose the foundation of the decision of the Circuit Court of Appeals. In *Dunbar* v. *Dunbar* the court denied the provability of the claim for breach of a contract, saying:

> "We do not think that by the use of the language cited in Section 63a it was intended to permit proof of contingent debts or liabilities or demands, the valuation or estimation of which it was substantially impossible to prove." (Page 350.)

The question there before the court—and the only question— was whether the claim as a whole was in its nature so contingent as not to be proveable under the quoted section of the Bankruptcy Act; there was no question as to whether the damages caused by the breach were allowable as a proposition of

general law. The cases cited in *Dunbar* v. *Dunbar* make the basis of the court's decision therein even clearer; the English cases bearing on the provability of contingent claims are examined and the English statute distinguished; the cases under former American bankruptcy acts are considered, and the cases under the act of 1898, in which contingent claims were allowed, are held not to apply to the claim presented in the Dunbar case. No proposition of general law was considered in *Dunbar* v. *Dunbar* or in the cited cases.

It is submitted that the Circuit Court of Appeals decided that the appellant's claim for damages for breach of contract was not contingent for six months, but was contingent thereafter and within the classification of unprovable contingent claims established by *Dunbar* v. *Dunbar*. That court evidently considered that the condition of recision in the contract under their consideration was the same in its effect on the character of the claim after six months, as the condition in the Dunbar contract, limiting the payment of alimony during the wife's lifetime. No other construction of the decision of the lower court is possible, especially in view of the fact, as pointed out in appellant's petition for certiorari, herewith submitted, that a disallowance of the claim after six months as a proposition of general law is manifestly absurd.

It cannot be successfully contended (Appellee's Brief, p. 9) that the question is the measure of damages. The entire claim of appellant was for damages for breach of contract, and the Circuit Court of Appeals held that damages were provable for six months, saying:

> "The liability arising under the breach of this contract was direct, and in no sense contingent, nor affected by the ruling in *Dunbar* v. *Dunbar*, 190 U. S. 340, 344, cited in support of the contention, *except as hereinafter stated.*" (Italics author's.)

The court then held, as stated, that the damages after six months were not a provable debt, since they fell within the prohibition of the Dunbar case.

We request that this Honorable Court will consider the appellant's petition for certiorari, together with this brief, so that we need not repeat the arguments therein advanced. They are sufficient to show that if the Circuit Court of Appeals decided the question here presented as a question of the measure of damages, it was ignorant of the fundamental principles of the law of damages for breach of contract—a criticism that could not be made of the circuit judges who were sitting in the Seventh Circuit.

The cases cited by counsel for appellee, denying specific performance of a contract for want of mutuality (*Ruthland Marble Co.* v. *Ripley*, 10 Wall. 339), or raising an issue of want of consideration, were not referred to by the Circuit Court of Appeals, and do not apply to the contract here at issue. No question of specific performance is presented and the mutual covenants of the parties to the contract are the consideration.

Since the decision of the Circuit Court of Appeals cannot be construed to be founded on a proposition of general law, without rendering it opposite to all authority, and since the court as the only ground for its decision referred to cases which admittedly in-

volve the construction of the Bankruptcy Act, we submit that the court below, in denying the right of appellant to prove its claim in bankruptcy for a period longer than six months, rested its decision on the construction of the Bankruptcy Act. The appellant was denied a right to prove its claim against appellee under the provisions of the Bankruptcy Act. A writ of error from the highest court of a state to this court could be maintained in the case at bar. (*Western Tie and Timber Co.* v. *Brown*, 196 U. S. 502, 507.) The motion to dismiss the cross appeal should, therefore, be denied.

Respectfully submitted,

RUDOLPH MATZ,
WILLIAM D. BANGS,
Counsel for Appellant.

Whether damages for anticipatory breach of an executory contract which one of the parties can cancel on notice after a stated period can be recovered for the life of the contract or only up to the end of such period after the breach involves no Federal question.

Where the question on which a cross appeal is based is of general importance in relation to questions involved on the direct appeal, the court may, and in this case does, allow a certiorari in lieu of the cross appeal which must be dismissed.

The general rule, the exceptions to which are not material in this case, is that where a party, bound by an executory contract, repudiates his obligations or disables himself from performance, the promisee has the option to treat the contract as ended and may maintain an action at once for damages occasioned by the anticipatory breach.

The intervention of bankruptcy, *held*, under the circumstances of this case, to constitute such a breach, notwithstanding the petition was involuntary; and also *held* that the claim of the promisee is one founded upon a contract expressed or implied and provable under § 63a–4, and that the damages may be liquidated under § 63b.

In this case, *held* that the claim may be proved for damages occasioned by the breach covering the entire life of the contract, notwithstanding the party proving the claim had the right to cancel on a stated notice, that provision not being reciprocal.

216 Fed. Rep. 308, affirmed as to allowance of claim; cross appeal therefrom dismissed; certiorari allowed and reversed as to amount of claim allowed.

THE facts, which involve the effect of bankruptcy of one party to an executory contract and the right of the other party to regard the same as an anticipatory breach of the contract and to prove its claim against the bankrupt's estate, are stated in the opinion.

Mr. Edwin C. Brandenburg, with whom *Mr. Frederick D. Silber* and *Mr. Clarence J. Silber* were on the brief, for Central Trust Company, Trustee:

Subdivisions 1 and 4 of § 63a, of the Bankruptcy Act, must be construed together, and the words, "absolutely owing at the time of the filing of the petition, etc.," appearing in subd. 1, are to be read into and construed as a part of subd. 4. *Zavelo* v. *Reeves*, 227 U. S. 625; *Re*

Roth, 181 Fed. Rep. 667; *Colman Co.* v. *Withoft*, 195 Fed. Rep. 230.

Anticipatory breach of an executory contract, results from a positive, unconditional and unequivocal declaration by a party thereto, or fixed purpose not to perform the contract, in any event or at any time. *Dingley* v. *Oler*, 117 U. S. 490; *Roehm* v. *Horst*, 178 U. S. 1; *Lake Shore &c. Ry.* v. *Richards*, 152 Illinois, 59; *Zack* v. *McClure*, 98 Pa. St. 541; *Johnstone* v. *Milling*, L. R. 16 Q. B. Div. 460; *Dalrymple* v. *Scott*, 19 Ont. App. Rep. 477; *People* v. *Globe Ins. Co.*, 91 N. Y. 174; distinguishing: *Lovell* v. *St. Louis Ins. Co.*, 111 U. S. 264; *Carr* v. *Hamilton*, 129 U. S. 252; *Penna. Steel Co.* v. *N. Y. City Ry.*, 198 Fed. Rep. 721, 735.

Neither insolvency nor the filing of an involuntary petition in bankruptcy, followed by adjudication, constitutes a breach of an executory contract, to which the insolvent or bankrupt is a party, and from which a provable debt accrues. *Phenix Bank* v. *Waterbury*, 197 N. Y. 161; *Re Agra Bank*, L. R. 5 Eq. Cas. 160; *Malcomson* v. *Wappoo Mills*, 88 Fed. Rep. 680; *Re Inman & Co.*, 171 Fed. Rep. 185; *S. C.*, 175 Fed. Rep. 312; *Lesser* v. *Gray*, 8 Ga. App. 605; aff'd in 236 U. S. 70; *Re Imperial Brewing Co.*, 143 Fed. Rep. 579; *Matter of Montague*, 32 Am. B. R. 106; distinguishing *Re Swift*, 112 Fed. Rep. 315; *Re Pettingill*, 137 Fed. Rep. 143; *Re Neff*, 157 Fed. Rep. 57.

Resulting claim for damages, if bankruptcy is in fact a breach, constitutes nothing more than a contingent claim, which is non-provable under the present Bankruptcy Act, § 63a. 1 Remington on Bank. (2d ed., § 641); *Dunbar* v. *Dunbar*, 190 U. S. 340; *Cotting* v. *Hooper*, 34 Am. B. R. 23; *Re Levy*, 208 Fed. Rep. 479; *Re American Vacuum Cleaner Co.*, 192 Fed. Rep. 939; *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549.

For the same reason, as applied to leasehold contracts,

subsequent installments of rent or damages for alleged breach through bankruptcy, of one of the parties, are not provable in bankruptcy. *Watson* v. *Merrill*, 136 Fed. Rep. 359; *Colman* v. *Withoft*, 195 Fed. Rep. 250; *Re Roth*, 181 Fed. Rep. 667; *Slocum* v. *Soliday*, 183 Fed. Rep. 410.

The contract involved passed, by operation of law, and as part of the bankrupt's estate, to the appellant as its trustee. *Gazlay* v. *Williams*, 210 U. S. 41.

As such, the appellant had a reasonable length of time after its election and qualification as trustee, to either assume or renounce performance of the contract. *Sparhawk* v. *Yerkes*, 142 U. S. 1, 13; *Sessions* v. *Romadka*, 145 U. S. 29; *Atch., Top. &c. Ry.* v. *Hurley*, 153 Fed. Rep. 503.

Mr. William D. Bangs, with whom *Mr. Rudolph Matz* and *Mr. John C. Mechem* were on the brief, for Chicago Auditorium Association:

Bankruptcy constitutes a material breach of executory contracts. Disablement from performance is a breach of contract. *Rochm* v. *Horst*, 178 U. S. 1.

Insolvency is often a disablement. *Chemical Bank* v. *World's Columbian Exp.*, 170 Illinois, 82; *Bank of Commissioners* v. *New Hampshire Trust Co.*, 69 N. H. 621.

Similarly, so is the appointment of a receiver. *Pennsylvania Steel Co.* v. *New York City Ry.*, 198 Fed. Rep. 721.

Or proceedings for liquidation under special statutes. *Lovell* v. *St. Louis Life Ins. Co.*, 111 U. S. 264; *Carr* v. *Hamilton*, 129 U. S. 252.

Bankruptcy is a complete disablement. *Re Swift*, 112 Fed. Rep. 315; *Re Pettingill*, 137 Fed. Rep. 143; *Re Neff*, 157 Fed. Rep. 57; *Re Duquesne Light Co.*, 176 Fed. Rep. 785; *Re Dr. Vorhees Co.*, 187 Fed. Rep. 611.

A claim for damages for a material breach of an executory contract caused by bankruptcy constitutes a provable debt. Cases *supra*, and see also *Zavelo* v. *Reeves*, 227 U. S. 625; *Ex parte Pollard*, 2 Lowell, 411; *Lesser* v.

Gray, 236 U. S. 70; *Grant Shoe Co.* v. *Laird*, 212 U. S. 445.

The present case does not involve an anticipatory breach of contract. Williston, Wald's Pollock on Contracts, pp. 362, 363; *Lowe* v. *Harwood*, 139 Massachusetts, 135.

The claim is provable, although the damages are unliquidated and the trustee has an option to continue the performance of executory contracts. *Grant Shoe Co.* v. *Laird*, 212 U. S. 445; *Re Swift et al.*, 112 Fed. Rep. 315; *Dunbar* v. *Dunbar*, 190 U. S. 340; *Cobb* v. *Overman*, 109 Fed. Rep. 65.

The rule as to the material breach of a covenant to pay rent does not apply to the material breach of executory contracts. Co. Litt. 292b, §§ 512 513; *Re Roth and Appel*, 181 Fed. Rep. 667; *Watson* v. *Merrill*, 136 Fed. Rep. 359; *Slocum* v. *Soliday*, 183 Fed. Rep. 410.

An option in one party of cancellation upon stipulated contingencies does not, after material breach by the other party, affect the recovery of damages for breach of contract by that party for whose benefit the option was inserted. *Dunbar* v. *Dunbar*, 190 U. S. 340.

The general policy of the Bankruptcy Act favors the provability of claims for damages upon executory contracts matured by bankruptcy. *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549.

MR. JUSTICE PITNEY delivered the opinion of the court.

On July 22, 1911, a creditors' petition in bankruptcy was filed against the Frank E. Scott Transfer Company, an Illinois corporation, and it was adjudged a bankrupt on August 7. The act of bankruptcy charged and adjudicated does not appear. When the proceedings were commenced, the bankrupt held contract relations with the Chicago Auditorium Association under a written agreement made between them February 1, 1911, which had been partially

performed. By its terms the Association granted to the Transfer Company, for a term of five years from the date of the contract, the baggage and livery privilege of the Auditorium Hotel, in the City of Chicago, that is to say, the sole and exclusive right, so far as it was within the legal capacity of the Association to grant the same, to transfer baggage and carry passengers to and from the hotel and to furnish livery to its guests and patrons. For the baggage privilege the Transfer Company agreed to pay to the Association the sum of $6,000, in monthly instalments of $100 each, and for the livery privilege the sum of $15,000 in monthly instalments of $250 each, and also agreed to furnish to the hotel and its guests and patrons prompt and efficient baggage and livery service at reasonable rates at all times during the continuance of the privileges. It was further agreed as follows:

"The party of the first part [Chicago Auditorium Association], however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so cancelled and revoked.

"Said rights and concessions shall not be assignable without the express written consent of the party of the first part, nor shall the assignment of the same, with such written consent, relieve the party of the second part [Scott Transfer Company] from liability on the covenants and agreements of this instrument.'

The contract authorized the Association, in the event of default by the Transfer Company in the payment of any instalment of money due, or in the performance of any other covenant, if continued for thirty days, to terminate the privileges at its option, without releasing the Transfer Company from liability upon its covenants. Should either or both of the privileges be thus terminated before January 31, 1916, the Association was to be at liberty to sell the privileges, or make a new or different contract for the remainder of the term, but was not to be obliged to do this, and the Transfer Company, unless released in writing, was to remain liable for the entire amount agreed to be paid by it.

Up to the time of the bankruptcy this contract remained in force, and neither party had violated any of its covenants. The trustee in bankruptcy did not elect to assume its performance, and the Association entered into a contract with other parties for the performance of the baggage and livery service, and obtained therefrom the sum of $234.69 monthly as compensation for those privileges. On February 28, 1912, it exhibited its proof against the bankrupt estate, claiming an indebtedness of $6,537.94, of which $311.20 had accrued prior to the bankruptcy proceedings, and the remainder was claimed as unliquidated damages arising under the contract for alleged breach thereof on the part of the bankrupt through the bankruptcy proceedings. Of this amount $691.86 represented the loss incurred during the first six months of bankruptcy. Objections filed by the trustee were sustained by the referee, except as to that portion of the claim which had accrued prior to the bankruptcy proceedings. On review, the District Court sustained this decision. On appeal to the Circuit Court of Appeals, the order of the District Court was reversed, and the cause remanded with direction to allow $691.86 upon the claim, and to disallow the remaining portion. 216 Fed. Rep. 308.

An appeal to this court by the trustee in bankruptcy was allowed, under § 25b-2 of the Bankruptcy Act (of July 1, 1898, c. 541; 30 Stat. 544, 553), upon a certificate by a Justice of this court that the determination of the questions involved was essential to a uniform construction of the Act throughout the United States. This is No. 162. Thereafter a cross-appeal by the Auditorium Association was allowed by one of the judges of the Circuit Court of Appeals. This is No. 174.

A motion is made to dismiss the cross-appeal, and this must be granted. In the absence of the certificate prescribed by § 25b-2, the sole authority for an appeal from a decision of the Circuit Court of Appeals allowing or rejecting a claim is found in § 25b-1: "Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States." This limits such appeals to cases where Federal questions are involved, of the kind described in § 237, Jud. Code. The motion to dismiss is resisted upon the ground that the claim of the Association to damages beyond a period of six months was denied by the Court of Appeals as not constituting a provable debt in bankruptcy, and that a Federal question is thus necessarily presented, provability depending upon a construction of the Bankruptcy Act. An examination of the opinion of that court, however, shows that while it held that damages for anticipatory breach of the contract were provable, it held that the contract itself, because of the option reserved to the Auditorium Association to cancel it on six months' notice, was mutually obligatory for that term only, and hence no damages beyond that period were allowable. This involved no Federal question. *Chapman* v. *Bowen*, 207 U. S. 89, 92.

But, in view of the general importance of the question of the amount allowable in its relation to the questions

involved in the trustee's appeal, we have concluded that a certiorari should be allowed in lieu of the cross-appeal.

Coming to the merits: It is no longer open to question in this court that, as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach. The rule has its exceptions, but none that now concerns us. *Roehm* v. *Horst*, 178 U. S. 1, 18, 19. And see *O'Neill* v. *Supreme Council*, 70 N. J. L. 410, 412. There is no doubt that the same rule must be applied where a similar repudiation or disablement occurs during performance. Whether the intervention of bankruptcy constitutes such a breach and gives rise to a claim provable in the bankruptcy proceedings is a question not covered by any previous decision of this court, and upon which the other Federal courts are in conflict. It was, however, held in *Lovell* v. *St. Louis Life Ins. Co.*, 111 U. S. 264, 274, where a life insurance company became insolvent and transferred its assets to another company, that a policy-holder was entitled to regard his contract as terminated and demand whatever damages he had sustained thereby. And see *Carr* v. *Hamilton*, 129 U. S. 252, 256. In support of the provability of the claim in controversy, *Ex parte Pollard*, 2 Low. 411; Fed. Cas. No. 11,252; *In re Swift* (C. C. A. 1st), 112 Fed. Rep. 315, 319, 321; *In re Stern* (C. C. A. 2d), 146 Fed. Rep. 604; *In re Pettingill & Co.* (D. C., Mass.), 137 Fed. Rep. 143, 146, 147; *In re Neff* (C. C. A. 6th), 157 Fed. Rep. 57, 61, are referred to; and see *Pennsylvania Steel Co.* v. *New York City Ry. Co.* (C. C. A. 2d), 198 Fed. Rep. 721, 736, 744. To the contrary, *In re Imperial Brewing Co.* (D. C., Mo.), 143 Fed. Rep. 579; *In re Inman & Co.* (D. C., Ga.), 171 Fed. Rep. 185;

CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT, *v.* CHICAGO AUDITORIUM ASSOCIATION.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHICAGO AUDITORIUM ASSOCIATION *v.* CENTRAL TRUST COMPANY, TRUSTEE, &c.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Nos. 162, 174. Argued January 12, 1916.—Decided April 3, 1916.

Appeals from decisions of the Circuit Court of Appeals, allowing or rejecting a claim in bankruptcy, are, in the absence of the certificate prescribed by § 25b-2, limited under § 25b-1 to cases involving Federal questions of the kind described in § 237, Jud. Code.

S. C., 175 Fed. Rep. 312; besides which a number of cases arising out of the relation of landlord and tenant are cited: *In re Ellis*, 98 Fed. Rep. 967; *In re Pennewell*, 119 Fed. Rep. 139; *Watson* v. *Merrill*, 136 Fed. Rep. 359; *In re Roth & Appel*, 181 Fed. Rep. 667; *Colman Co.* v. *Withoft*, 195 Fed. Rep. 250. Cases of the latter class are distinguishable, because of the "diversity betweene duties which touch the realty, and the meere personalty." Co. Litt., 292, b, § 513.

The contract with which we have to deal was not a contract of personal service simply, but was of such a nature as evidently to require a considerable amount of capital, in the shape of equipment, etc., for its proper performance by the Transfer Company. The immediate effect of bankruptcy was to strip the company of its assets, and thus disable it from performing. It may be conceded that the contract was assignable, and passed to the trustee under § 70a (30 Stat. 565), to the extent that it had an option to perform it in the place of the bankrupt (see *Sparhawk* v. *Yerkes*, 142 U. S. 1, 13; *Sunflower Oil Company* v. *Wilson*, 142 U. S. 313, 322); for although there was a stipulation against assignment without consent of the Auditorium Association, it may be assumed that this did not prevent an assignment by operation of law. Still, the trustee in bankruptcy did not elect to assume performance, and so the matter is left as if the law had conferred no such election.

It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by creditors. This view was taken, with respect to the effect of a state proceeding restraining a corporation from the further prosecution of its business or the exercise of its corporate franchises, appointing a receiver, and

dissolving the corporation, in *People* v. *Globe Ins. Co.*, 91 N. Y. 174, cited with approval in some of the Federal court decisions above referred to. In that case, it did not appear that the company was the responsible cause of the action of the State, so as to make the dissolution its own act; but, irrespective of this, we cannot accept the reasoning. As was said in *Rochm* v. *Horst*, 178 U. S. 1, 19: "The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due." Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 554. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for non-performance in the future, although without the property or credit often necessary to enable them to per-

form. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Rochm* v. *Horst*, *supra*.

The claim for damages by reason of such a breach is "founded upon a contract, express or implied," within the meaning of § 63a-4, and the damages may be liquidated under § 63b. *Grant Shoe Co.* v. *Laird*, 212 U. S. 445, 448. It is true that in *Zavelo* v. *Reeves*, 227 U. S. 625, 631, we held that the debts provable under § 63a-4 include only such as existed at the time of the filing of the petition. But we agree with what was said in *Ex parte Pollard*, 2 Low. 411, Fed. Cas. No. 11,252, that it would be "an unnecessary and false nicety" to hold that because it was the act of filing the petition that wrought the breach, therefore there was no breach at the time of the petition. And as was also declared in *In re Pettingill*, 137 Fed. Rep. 143, 147: "The test of provability under the Act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under § 63b (30 Stat. 562)." It was in effect so ruled by this court in *Lesser* v. *Gray*, 236 U. S. 70, 75, where it was said: "If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding, no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach and defendant Gray became liable for any resulting damage; but he was released therefrom by his

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discharge." Of course, he could not be released unless the debt was provable.

We therefore conclude that the Circuit Court of Appeals was correct in holding that the intervention of bankruptcy constituted such a breach of the contract in question as entitled the Auditorium Association to prove its claim.

The denial of all damages except such as accrued within six months after the filing of the petition was based upon the ground that the contract reserved to the Association an option to revoke the privileges by giving six months' notice in writing of its election so to do, in which case both parties were to be released from further liability at the expiration of the six months. It was held that because of this the contract was mutually obligatory for that term only, and uncertain and without force for any longer term of service *in futuro*, within the ruling of this court in *Dunbar* v. *Dunbar*, 190 U. S. 340. In that case the contract was to pay to a divorced wife "during her life, or until she marries, for her maintenance and support, yearly, the sum of five hundred dollars"; and it was held that for instalments falling due after bankruptcy the husband remained liable, notwithstanding his discharge, on the ground that the wife's claim for such payments was not provable because of the impossibility of calculating the continuance of widowhood so as to base a valuation upon it. The court referred to the 1903 amendment of § 17 of the Bankruptcy Act (32 Stat. 797) relating to debts not affected by a discharge, and including among these a liability for alimony due or to become due for maintenance or support of wife or child. This, while enacted after the Dunbar suit was begun, and not applicable to it, was cited as showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support of his wife or children. The authority of that decision cannot be extended to cover

such a case as the present. Here the obligation of the bankrupt was clear and unconditional. The right reserved to the Auditorium Association to cancel and revoke the privileges was reserved for its benefit, not that of the grantee of those privileges. It does not lie in the mouth of the latter, or of its trustee, to say that its service would not be satisfactory, and there is no presumption that otherwise it would have been advantageous to the Association to exercise the option. It results that the decree, in so far as it limits the provable claim to a period of six months after the bankruptcy, must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

No. 162. Decree affirmed. No. 174. Appeal dismissed. certiorari allowed, and decree reversed.